

Zarda Brothers Dairy, Inc. and Milk Drivers and Dairy Employees, Local No. 207, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 17-CA-7435

January 6, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS
PENELLO AND MURPHY

On July 20, 1977, Administrative Law Judge Robert W. Leiner issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a brief in support of exceptions; the Union filed a brief in support of the Administrative Law Judge's Decision; and the General Counsel filed its brief which had previously been submitted to the Administrative Law Judge.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge only to the extent consistent herewith.

We agree with the Administrative Law Judge, for the reasons stated by him, that Respondent violated Section 8(a)(1) of the Act, commencing in October 1976, by coercively interrogating employees, by suggesting to its employees that their support for the Union was futile since Respondent would not sign a contract with the Union, and by announcing and granting a wage increase to its employees on November 1, 1976, for the purpose of interfering with the employees' organizational campaign on behalf of the Union.²

Contrary to the Administrative Law Judge, however, we find that Respondent discharged Ripperger on December 3, 1976, for cause rather than for reasons related to his union and concerted protected activities,³ notwithstanding that, between mid-September and mid-October, Mark Ripperger was active

in support of the Union, and Respondent knew of his activities and expressed hostility to those activities in various ways, as set forth above.

Ripperger was hired by Respondent in May 1976 as an ice cream dockhand. As such, he was responsible for moving various ice cream products from Respondent's freezer to its loading dock and onto its trucks for delivery by the drivers. As the Administrative Law Judge found, another of his duties was "to execute orders ('loadouts')." A loadout is a slip of paper which indicates the amounts of various types of ice cream products to be loaded on a particular truck. The loadout for the truck serving Respondent's stores is prepared in Respondent's office and brought to the freezer area, where it is hung on a clipboard. As the products listed on the loadout are brought from the freezer and sent to the loading dock, they are checked off on the loadout.

Bavarian ice cream is a special product sold only in Respondent's stores. It is manufactured only on Wednesdays and shipped only on Thursdays and Fridays. A copy of an "ice cream slip," which notifies Respondent's ice cream production unit how much Bavarian to produce, is delivered to the freezer area on Monday of each week. Supervisor Larry Brown and Plant Manager Tom Zarda both testified at length to the effect that it was Ripperger's responsibility to make notations on the Thursday and Friday loadouts, based on the information on the Bavarian ice cream slip, as to the amounts of Bavarian to be shipped on those days.⁴

The loading operation regularly began at 6 a.m. when the truck which delivered ice cream products to Respondent's stores was loaded. Ripperger was assisted in loading this truck by production employees Dennis Brown and Gary Randolph. Ripperger's initial responsibility was to load ice cream specialties or novelties, such as ice cream bars and popsicles. When this was completed, he joined D. Brown and Randolph in loading half-gallon and 3-gallon containers. When the loading of this truck was completed, usually around 8 a.m., Randolph and D. Brown returned to their primary jobs in ice cream production. The truck usually left the dock at 8:30 a.m. For the remainder of his working day, Ripperger primarily prepared loads of ice cream for the

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings, except as specifically noted below.

² In adopting the Administrative Law Judge's findings and conclusions that Respondent's announcement and grant of the wage increase violated Sec. 8(a)(1), we point out that the Administrative Law Judge erred in his fn. 22 when he stated that Respondent's business consultant, Dr. Allvine, testified that "the wage increases 'in a limited sense' were merit increases"

In fact, Dr. Allvine's testimony was that the increases for store managers and office personnel were merit-related in a limited sense; however, he testified that, with regard to the production and maintenance employees and drivers, merit was not a factor.

³ We also disavow the Administrative Law Judge's finding and conclusion that Respondent engaged in surveillance. There was no allegation in the complaint that Respondent engaged in unlawful surveillance of its employees' union activities, nor was the issue raised at the hearing. The Administrative Law Judge apparently, albeit erroneously, concluded that by asking one of its employees about the union activities of another employee, Respondent thereby engaged in surveillance of the latter employee.

⁴ Employee Pankey testified that the amount of Bavarian on the loadout was "penciled in, or written with the freehand."

wholesale route truckdrivers and brought those loads to the loading dock for the drivers to hoist onto their trucks. He also had certain "housekeeping" responsibilities which included keeping the freezer clean and clear of obstructions.

The Administrative Law Judge reconstructed the circumstances of Ripperger's discharge as follows: In late November 1976, Ed Majewski, Respondent's inventory controller, heard Larry Brown on several occasions state that Ripperger would have to be terminated because he made so many mistakes in loading. Majewski, toward the end of November, handed Ripperger a note warning him that he would be or might be fired.

On Thursday, December 2, 1976, Ripperger forgot to load Bavarian on Respondent's trucks. When Larry Brown, Ripperger's supervisor, discovered this error, he and Supervisor Allan Jones told Ripperger, Gary Randolph, and Dennis Brown to make sure that the Bavarian was shipped the next day.⁵ However, on Friday, December 3, the Bavarian again was not loaded. Around 8 a.m., when the truck was still in the dock, Gary Randolph noticed this omission and told Ripperger he had forgotten the Bavarian. Ripperger replied, "It will all work out . . . they can make a special run if they want to."

When Larry Brown arrived at work around 9 a.m., Randolph informed him of Ripperger's failure to load the Bavarian and of Ripperger's statement. Brown checked the loadout sheets and observed that the stores were not checked off; he then checked the freezer and found that not only had the Bavarian been forgotten, but a dolly of ice cream for Respondent's store 8 had also been left behind. At this point, Brown went to the breakroom, found Ripperger, and informed him of his errors.⁶ Brown testified that Ripperger appeared to take the matter as a joke. Brown told Ripperger to stay where he was and went to tell Tom Zarda what had happened. Zarda told Brown to handle it. Brown returned to confront Ripperger once more. Brown testified that in response to his angry admonishments for Ripperger's errors, Ripperger laughed under his breath and said, "If you don't like it, why don't you fire me?" At that point, Brown did fire him. Ripperger denied laughing or suggesting that Brown fire him and testified, instead, that Brown, in anger over the failures to load, told him, "I'm sorry, there's nothing I can do. As far as I'm concerned, you're fired."

The Administrative Law Judge concluded that the discharge of Ripperger was unlawful for the following reasons:

⁵ Larry Brown further testified that he specifically told Ripperger to see that the Bavarian was on the loadout sheets and on the truck the next day.

⁶ The Administrative Law Judge credited Ripperger's testimony that,

1. The responsibility for loading the Bavarian was as much Randolph's as it was Ripperger's. Loading errors by other employees were common and were not considered important by Respondent's supervisors. No other employee had been discharged or disciplined for such errors. Therefore, Respondent's discharge of Ripperger for failing to load the Bavarian constituted disparate treatment.

2. Larry Brown gave inconsistent reasons for discharging Ripperger (i.e., that he fired Ripperger for loading errors and sloppy housekeeping in the freezer and that he fired him in response to his "why don't you fire me" statement). In this regard, the Administrative Law Judge specifically discredited Brown's testimony that Ripperger laughed and dared Brown to fire him and also discredited Donald Pankey, a truckdriver for Respondent, who testified that Brown told him he had fired Ripperger in response to the latter's alleged flippant remark. Pankey was not to be credited, the Administrative Law Judge said, because Pankey had been accused of stealing and therefore might be an "accommodating witness" for Respondent. The Administrative Law Judge further found the alleged "fire me" remark "inconsistent with contemporary events, including Ripperger's evidently guilty behavior in running after the truck and in his discovery that he also failed to load the . . . ice cream for Respondent's Store No. 8." Finally, the Administrative Law Judge stated that he did not believe "that in the face of Brown's ensuing anger, Ripperger would have dared Brown to fire him."

3. The November 1 wage increase given to Ripperger was, in part, a merit increase; this shows that, as of that date, Respondent considered Ripperger a sufficiently meritorious employee to be worth retaining.

4. The Administrative Law Judge inferred, in his footnote 14, that Ed Majewski's note to Ripperger warning him that he was "going to be fired" demonstrated that "the decision to discharge Ripperger was made at the end of November." Therefore, the cited failure to load the Bavarian as the reason for discharging Ripperger was "pretextual."

5. None of the Zarda brothers "took any responsibility for, or, indeed had knowledge of the discharge." Respondent's failure to conduct an investigation of its employee's alleged misconduct was evidence of discriminatory intent⁷ and insulated Respondent's higher management from the discovery that another employee had responsibility for the failure to load the Bavarian. In this regard, the Administrative Law Judge concluded that when Larry Brown came to Tom Zarda on the morning of December 3

upon being told of his errors, he ran after the truck but was unable to catch it, and returned to inform L. Brown of this.

⁷ Citing *Firestone Textile Company*, 203 NLRB 89, 95 (1973).

to tell him of Ripperger's failure to load the Bavarian, Zarda did not investigate the incident because an investigation would have revealed that Randolph, an employee who had informed Respondent about certain union activities, shared responsibility for the failure to load and should have been punished along with Ripperger. The Administrative Law Judge further concluded that in telling Brown that he should "handle it," Zarda was "seizing upon the opportunity to have Brown discharge Ripperger independent of any union activity, with Tom Zarda playing no part in the discharge." In other words, according to the Administrative Law Judge, "even if Larry Brown's desire in firing Ripperger did *not* include any unlawful motive, Larry Brown was being used as a cat's paw by Tom Zarda, who saw and seized on the opportunity."

For the following reasons, we find that the Administrative Law Judge's rationale, set forth above, is either unsupported by the record or internally inconsistent.

With regard to paragraph 1, above, the Administrative Law Judge found that Ripperger, Randolph, and D. Brown had been told by supervisors to be sure the Bavarian was loaded on December 2 and 3. However, as set forth above, Larry Brown and Tom Zarda testified that it was Mark Ripperger's responsibility to note on the loadouts the amount of Bavarian to be shipped each day. This notation would in turn inform Randolph and Brown of the amount of Bavarian they were to move out of the freezer. Larry Brown testified that, on the afternoon of December 2, he "told [Ripperger] just before he went home to make sure the Bavarian ice cream was wrote [sic] on the orders and put on the truck the next day, and he said that it would be." On December 2 and 3 the Bavarian was not noted on the loadout slip. Ripperger denied that he had been given any instructions regarding loadouts for the Bavarian. Although the Administrative Law Judge credits Tom Zarda elsewhere, he made no finding on this issue. If, as Respondent contends, noting the Bavarian on the loadouts was Ripperger's responsibility, Ripperger, rather than Randolph or D. Brown, was properly the focus of Larry Brown's anger for the mistakes of December 3. The record supports a finding, which we make, that it was Ripperger's responsibility to note the Bavarian on the loadouts, for such responsibility is entirely consistent with his conceded responsibility to execute loadouts on other products. Furthermore, we note that Randolph noticed that the Bavarian had

not been loaded at approximately 8 a.m. when he was normally due at his production job. At that time he notified Ripperger, who was the only employee left on the dock, of the omission, thereby giving Ripperger ample time to remedy the error before the truck was due to leave at 8:30 a.m. Additionally, the Administrative Law Judge credited the testimony of Randolph, over Ripperger's denial, that Ripperger said, when told of his omission, "It will all work out . . . they can make a special run if they want to." We do not, therefore, consider unreasonable Larry Brown's dissatisfaction with Ripperger for his failure to load the Bavarian and perform other duties on December 3. Finally, although the record shows that mistakes are not uncommon and that Respondent has a generally lenient attitude with regard to employees who make mistakes, Respondent clearly believed that Ripperger's errors, while only occasionally serious, were of such frequency as to cause a mounting anger and frustration on the part of his supervisor and those drivers whom he repeatedly shorted (i.e., failed to fully load). While there is no evidence that any other employee had been fired for making mistakes, it is not necessarily disparate treatment for an employer to discharge the person it considers its worst employee.⁸

In finding Larry Brown gave inconsistent reasons for firing Ripperger, as set forth in paragraph 2, *supra*, the Administrative Law Judge found that the testimony of Brown and Pankey, that Brown fired Ripperger because he failed to load the Bavarian on Pankey's truck, is contradicted by Brown's answer of "No, sir" when asked if he fired Ripperger because of his failure to ship Bavarian 2 days in a row. We disagree. The Administrative Law Judge apparently overlooked Brown's testimony, immediately thereafter, that he had fired Ripperger because generally "he did not do his job right," and specifically because Ripperger's shortages "were real bad," "his house-keeping poor," and his inventory "was really bad." Rather than contradicting the testimony of Brown and Pankey, this is Brown's amplification of his reasons for discharging Ripperger. Thus, the failure to load the Bavarian was obviously only part of the reason, and the negative answer and subsequent testimony refer to the totality of the reasons. In this connection it must be noted Ripperger testified that this failure to load was the very reason Brown gave for discharging him.⁹

With regard to paragraph 3, as noted above, the Administrative Law Judge's attributing to Dr. All-

Law Judge that the discharge was for cause and that respondent was not required to continue its policy of leniency "on pain of being held to have engaged in discriminatory conduct."

⁹ The Administrative Law Judge discredited the testimony of Brown (that he fired Ripperger in response to the latter's dare to fire him) and Pankey (that Brown told him that the discharge was in response to that

⁸ See *Merrill Transport Co. Inc.*, 224 NLRB 150, 153 (1976). In that case, the respondent discharged an employee for repeated careless errors stemming from his neglect of his duties. The General Counsel contended that, because respondent had been lenient in the past with regard to employee errors of this nature, the discharge constituted disparate treatment and was unlawful. The Board, however, adopted the finding of the Administrative

vine testimony that the wage increase given to Ripperger, along with all other employees, was in part a merit increase, is unsupported by the record. Dr. Allvine testified that the wage increases for store managers and office personnel were "in some respects, in a limited sense, on a merit basis." However, he also testified that, with regard to production people, drivers, and so forth, the speed with which they were to be raised to a \$1,200-per-month wage level "was not determined by merit." Every employee, including Ripperger, earning less than that amount was raised to that level. Respondent's management discussed the possibility of not granting Ripperger the increase in view of his poor employment history, but rejected that idea lest such action would result in unfair labor practice charges. In these circumstances, therefore, it is clear that the inclusion of Ripperger in Respondent's across-the-board pay increase plan is not evidence that Respondent considered him to be a satisfactory employee.

With regard to paragraph 4, *supra*, we do not agree with the Administrative Law Judge that Ed Majewski's warning note to Ripperger shows that a decision to discharge Ripperger was made in November and, therefore, that Ripperger's failure to load the Bavarian on December 2 and 3 was used as a pretext.

Majewski, Respondent's inventory controller, testified that throughout November, Larry Brown complained frequently about Ripperger's "many mistakes in loading the 'load-outs.'" On one occasion, in late November, he heard Brown say, "I'm just going to have to let him go."

The Administrative Law Judge did "not doubt that Brown complained to Majewski about Ripperger's work habits,"¹⁰ and there is no evidence that Brown ever mentioned Ripperger's union activities or sympathies to Majewski. Nonetheless, based on his erroneous finding that "there is no evidence of any particular Ripperger errors in November,"¹¹ the Administrative Law Judge inferred that a decision to discharge Ripperger was made at the end of November. Consequently, according to the Administrative Law

dare). The Administrative Law Judge discredited Brown's testimony that Ripperger made inflammatory remarks immediately prior to his discharge on the grounds that it is "inconsistent with contemporary events" and because the Administrative Law Judge does "not believe that in the face of Brown's ensuing anger Ripperger would have dared Brown to fire him." We find nothing in the circumstances surrounding the discharge which would undermine or contradict Brown's assertion that Ripperger was provocative. In fact, the Administrative Law Judge himself conceded that one of the bases on which Respondent could lawfully have discharged Ripperger was "his apparent generalized insolence in his relationship with Supervisors Allen Young and Larry Brown."

The Administrative Law Judge discredited Pankey on the ground that Pankey was "apparently accused of stealing" and therefore might be an "accommodating witness for Respondent's cause." There is not a scintilla of evidence in the record, however, that Respondent ever suspected, much less accused, Pankey of theft.

The Administrative Law Judge's premises for discrediting Brown and

Judge, the incidents of December 2 and 3 were "pretextual."

First of all, it is not clear from the evidence cited by the Administrative Law Judge that an actual decision to discharge Ripperger had in fact been made in late November. Although it appears that Brown was considering such a step then, because of Ripperger's job performance, we see nothing in Brown's statements or the record to indicate that he had actually decided to discharge Ripperger at that time. His remark about "going to have to let him go" connotes future action in that it implies that Brown was increasingly dissatisfied with Ripperger and he would be discharged if his performance did not improve.

Furthermore, in order for us to find any discharge or decision to discharge unlawful, it must be shown that such decision or discharge was unlawfully motivated. None of the evidence or testimony discussed by the Administrative Law Judge indicates that, even assuming *arguendo* that Brown had decided in late November to discharge Ripperger, any factor other than Ripperger's poor work performance played a part in such decision. If Brown had in fact decided prior to December 3 to discharge Ripperger for cause, his discharge of Ripperger on December 3 for further cause would be neither pretextual nor unlawful. Inasmuch as the Administrative Law Judge points to no evidence indicating that Brown's motives were related to Ripperger's union activities or sympathies, we find unsupported and unwarranted the Administrative Law Judge's inferences of such unlawful motives.

According to the Administrative Law Judge's analysis (set forth in paragraph 5, *supra*) of the events of December 3, Tom Zarda, by telling Supervisor Larry Brown to handle his problem with Ripperger, was actually giving the unsuspecting (and, as the Administrative Law Judge apparently concedes, lawfully motivated) Brown the go-ahead signal to fire Ripperger, and in so doing was using Brown as a "cat's paw" for Zarda's own unlawful motivation. Zarda seized on this opportunity, and failed to order an investigation of Ripperger's alleged misconduct, the

Pankey, therefore, are at least questionable. However, even accepting these credibility resolutions, we find for reasons stated elsewhere in this decision that the discharge was not unlawful.

¹⁰ In fact, the Administrative Law Judge was unwilling to infer on this record that Majewski's note was prompted by references to anything other than work-related problems.

¹¹ Contrary to the Administrative Law Judge, driver Chuck Sims testified that Ripperger shorted his truck one to three times per week throughout November, and driver Donald Pankey testified at length regarding the troubles he had with Supervisor Larry Brown due to Ripperger's constant shorting of his truck. In late November, Pankey had a conversation with Sales Manager Ed Zarda regarding this problem. Also in late November, Ripperger made a rather serious omission, forgetting to load two cases of one-half gallons onto Pankey's truck. It is clear, therefore, that the record contains ample evidence of Ripperger's poor work record throughout November, which prompted Brown's comments to Majewski and the latter's warning notes to Ripperger.

Administrative Law Judge concluded, because an investigation would have necessitated punishing the equally responsible Randolph, an antiunion employee who had given Respondent information regarding union organizational activities.

However, this is all speculation. There is nothing in the record indicating that Brown lacked the authority to fire Ripperger if he so wished, that Tom Zarda acted improperly in suggesting that Brown could handle the situation, or that Zarda customarily involved himself in other supervisory decisions to discharge. Similarly lacking is any evidence that Brown told Zarda that he intended to fire Ripperger, that Zarda meant "go ahead and fire him" when he said "handle it," or that Zarda had anything other than Ripperger's job performance in mind during his discussion with Brown. Finally, there is no evidence that Brown mentioned Randolph to Zarda on December 3.

The Administrative Law Judge has assumed that Zarda somehow "knew" that an investigation would reveal that Respondent could not punish Ripperger without also punishing Randolph. Accordingly, the Administrative Law Judge concluded that Zarda gave Brown a verbal signal to implement Brown's decision to discharge Ripperger. However, there is no evidence that Zarda was aware that Randolph was involved in any way. But, even if he were, the Administrative Law Judge's scenario, even if accepted at face value, undercuts his own conclusion; for, if Brown's discharge of Ripperger was not unlawfully motivated, it is irrelevant whether or not Zarda was glad, for antiunion reasons, to see him fired.¹² It was Brown who held Ripperger responsible for the failure to load the Bavarian, and it was Brown who fired him.

In summary, as set forth above, the Administrative Law Judge's conclusion that the failure to load Bavarian was a pretext is not supported by the record. The fact that at the hearing Brown gave additional reasons for firing Ripperger does not require a different conclusion. Contrary to the Administrative Law Judge, the reasons Brown gave are not inconsistent but rather are the elements of the general reason for the discharge; i.e., poor job performance. The Administrative Law Judge's conclusions regarding Tom Zarda's motives are pure speculation, unsupported

by the record. The Administrative Law Judge concedes that Ripperger could have been lawfully discharged based on his "failure to work with other employees, capped by his repeated failure to ship the 'Bavarian' half-gallons; and his apparent generalized insolence in his relationship with Supervisors Allen Young and Larry Brown."¹³ Inasmuch as Ripperger's poor attitude and work performance were well known to Respondent's management and employees, Respondent's failure to investigate Ripperger's "alleged misconduct"¹⁴ clearly does not warrant an inference that Respondent's discharge of Ripperger was unlawfully motivated.

A final factor which persuades us that the discharge of Ripperger was not unlawfully motivated is the length of time between Respondent's other unfair labor practices found herein and the discharge of Ripperger on December 3. After mid-October 1976, Ripperger's organizational efforts were in virtual dormancy. Similarly, with the exception of the wage increase of November 1, Respondent's conduct found herein to be unlawful occurred on or before October 15. There is no evidence that, by late November or early December, Respondent had any reason to believe that Ripperger was still interested or active in the Union, and there is no evidence that Respondent viewed the Union or Ripperger's union activities with concern at that time.

In light of all of the above, we find that there is not substantial evidence on this record to support the finding that Ripperger's discharge was unlawfully motivated. Accordingly, we will dismiss that portion of the complaint alleging that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Ripperger.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act on or about November 1, 1976, by announcing and granting a wage increase to its employees for the purpose of interfering with the organizational campaign of the Union among such employees, thereby

freezer after he filled his orders for the morning) occurred on December 2, the day before Ripperger was discharged.

¹⁴ *Firestone Textile, supra*, cited by the Administrative Law Judge, involved the respondent's failure to investigate, prior to discharge, the allegation of a supervisor that an *admittedly satisfactory* employee had been soliciting a union card during worktime, in spite of that employee's denial. In fact, the piece of paper contained information regarding the possible sale of a pickup truck. Here, Ripperger is not an *admittedly satisfactory* employee, and his alleged misconduct, which clearly occurred, was totally consistent with his history of poor work habits and attitude.

¹² See, e.g., *Klate Holt Company*, 161 NLRB 1606, 1612 (1966).

¹³ The Administrative Law Judge rejected, as a basis for Ripperger's discharge, his alleged poor housekeeping in the freezer because of Ripperger's "uncontradicted" testimony that the litter was caused by drivers. However, nothing in the record indicates that Ripperger's housekeeping duties depended on who caused the litter or, conversely, that he was relieved of those duties if he were not the sole cause of the litter. Furthermore, Ripperger's testimony was not uncontradicted; Larry Brown testified specifically regarding at least two varieties of housekeeping problems caused by Ripperger and not attributable to drivers. According to Brown, one of these instances (i.e., not picking up papers and removing pallets from the upstairs

interfering with, restraining, and coercing employees in the exercise of rights guaranteed in the Act.

4. Respondent violated Section 8(a)(1), commencing on or about October 1976, by coercively interrogating employees and by making declarations to employees that their joining or supporting the Union would be futile since it would not sign a contract with the Union.

5. The foregoing unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not violated the Act in any manner not specifically found herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Zarda Brothers Dairy, Inc., Shawnee, Kansas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Granting wage increases or other benefits to employees for the purpose of impeding or interfering with their self-organizational activities. However, nothing in this Order requires that Respondent withdraw, vary, or abandon any such wage increase or other benefits.

(b) Coercively interrogating employees or stating that employees' support of the Union would be futile because it would never sign a contract with the Union.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization; to form, join, or assist Milk Drivers and Dairy Employees, Local No. 207, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization; to bargain collectively through representatives of their own choosing; to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; or to refrain from any or all such activities.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at all of its plants, warehouses, and offices copies of the attached notice marked "Appendix."¹⁵ Copies of said notice, on forms provided by the Regional Director for Region 17, after being duly signed by an authorized representative of Respondent, be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken

by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 17, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

¹⁵ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

Following a hearing at which we participated and offered evidence, it has been found that we violated the Act. We have been ordered to post this notice and abide by the following:

WE WILL NOT grant a wage increase for the purpose of interfering with or discouraging our employees' interest in the Union. However, we are not required to withdraw, vary, or abandon such wage increases.

WE WILL NOT coercively interrogate employees regarding their union or other concerted activities; WE WILL NOT tell them that joining the Union is futile.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the Act.

ZARDA BROTHERS DAIRY,
INC.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge: The hearing in this case was held before me in Kansas City, Kansas, on March 3, 4, 15, and 16, 1977, based upon the complaint and notice of hearing issued by the Regional Director for Region 17, on January 28, 1977, alleging that Respondent engaged in violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended. Briefly stated, the complaint alleges that Respondent, by various acts of its supervisors, engaged in unlawful interrogation, and made unlawful statements and grants of benefits in order to interfere with the protected rights of its employees under Section 7 of the Act; and, on December 3, 1976, unlawfully discharged and thereafter refused to reemploy its employee, Mark Ripperger. The acts of independent violations of Section 8(a)(1) were alleged to commence on

or about October 7, 1976, and were designed to interfere with and prevent the organizing of Respondent's employees by a labor organization. In its duly filed answer of February 2, 1977, Respondent admitted certain of the jurisdictional allegations of the complaint as well as allegations that six named persons were Respondent's supervisors and agents within the meaning of Section 2(11) and (13) of the Act. Respondent denied the commission of any unfair labor practices.

Upon the basis of the entire record in the case, including my observation of the witnesses and of their demeanor, and upon careful consideration of the briefs duly filed with me by counsel for each of the parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent admits, and I find that Respondent, at all times material, is a corporation maintaining a facility at West 63d Street, Shawnee, Kansas, where it is engaged in the processing, and wholesale and retail distribution of dairy products; that in the course and conduct of its business operations within the State of Kansas, Respondent annually purchases goods and services valued in excess of \$50,000 directly from suppliers located outside the State of Kansas; and annually sells goods and services valued in excess of \$50,000 directly to customers located outside the State of Kansas. I conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act as Respondent admits.

II. THE UNION AS A LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that Milk Drivers and Dairy Employees, Local No. 207, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, has been at all material times herein a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES¹

The complaint alleges and Respondent's answer admits that Respondent's general manager, Ben Zarda; production manager, Tom Zarda; sales manager, Ed Zarda; dock manager, Jim Zarda; Allen Jones, ice cream production supervisor; and Larry Brown, ice cream loadout supervisor, all are supervisors within the meaning of Section 2(11), and agents within the meaning of Section 2(13) of the Act. I so find.

Respondent's employees are not represented by a labor organization.

A. *The Employment and Union Activities of Mark Ripperger; Alleged Violations of Section 8(a)(1)*

Mark Ripperger was employed by Respondent in May 1976, and was discharged by Respondent on December 3,

1976. At all times, he was employed in the freezer as an ice cream loader, particularly to execute orders (loadouts) and to load trucks with ice cream "specialties" or "novelties" such as ice cream bars and popsicles. He also aided in the loading of half-gallon and 3-gallon containers of ice cream. His place of employment was at Respondent's loading dock in Shawnee, Kansas. Ripperger's supervisor up through the end of August 1976 was Zarda's dock manager, Jim Zarda, nephew of President and General Manager Ben Zarda. Commencing with the end of August 1976, Jim Zarda, with increasing responsibilities, no longer directly supervised Ripperger. At that time Larry Brown was hired as Ripperger's supervisor.

Respondent ships ice cream to its own retail stores in the Kansas City, Missouri, area in its own trailer trucks. It also delivers to various hotels, stores, and other customers who sell Zarda ice cream at retail. Such deliveries are made in Zarda Brothers straight-body trucks. These trucks are driven by Respondent's wholesale "route" drivers. Ripperger's job, commencing at or about 6 a.m., was first to load the truck delivering to Respondent's retail stores. He was assisted in this function by two ice cream production employees, Gary Randolph and Dennis Brown, who thereafter left the loading area and returned to their primary jobs in ice cream production at or after 8 a.m. This loading job took about 2 hours commencing at 6 a.m. and ending about 8 a.m. As part of this job Ripperger, after loading the novelties, ordinarily helped Randolph and Brown remove half-gallon and 3-gallon containers from the freezer and place them on the loading dock. Randolph and Brown did not load ice cream into trucks. With regard to the route drivers, Ripperger and the truckdrivers would ordinarily prepare the load for the route trucks. Randolph and Brown had no part in this procedure. It should be noted that although Ripperger loaded the trucks in the morning, he did not actually load the route drivers' trucks in the afternoon, but merely placed the ice cream to be loaded on the dock so that the driver would load. The evidence shows that none of these employees had exclusive responsibility for the removal from the freezer of any particular ice cream outside of Ripperger who had the sole responsibility of loading novelties in the morning. With regard to the loading of certain ice cream known as Bavarian half gallons on December 2 and 3, 1976, the evidence shows that all three of these employees were instructed by Supervisors Larry Brown and Allen Jones to make sure that the Bavarian half-gallons were shipped out on those days.

In the middle of September 1976, Ripperger, unhappy with working conditions and perhaps disgruntled over the appointment of the newly hired Larry Brown as his supervisor, telephoned Larry Joye, son of Furman Joye, president of the Union. He asked Larry Joye the method by which Respondent could be unionized and was told of a requirement of having 30 percent of the employees in favor of the Union. Thereafter, at a later meeting, Furman Joye gave Ripperger union membership application cards and union literature. Ripperger then distributed the union membership cards on work breaks and spoke to some 50

¹ The complaint, *inter alia*, alleged that the termination of employee Dwight Kessler violated Sec. 8(a)(3) of the Act. On Respondent's motion, made at the conclusion of General Counsel's case-in-chief, I dismissed the

allegation of the unlawful discharge of Dwight Kessler. General Counsel did not oppose my ruling.

employees employed in Respondent's plant. Ben Zarda testified that Respondent, at its plant and stores, employs about 95 employees with about 50 production and maintenance employees at the plant.

On or about September 13, Jim Zarda (allegedly no longer Ripperger's immediate supervisor) told Ben Zarda he was receiving complaints from other supervisors relating to Ripperger's poor housekeeping, inventory control in the freezer, and shortages in loading. When Ben Zarda then spoke to Ripperger of the complaints, and also of Ripperger's dissatisfaction with Respondent's insurance plan, Ripperger said that although there were problems in the freezer, they resulted from a lack of cooperation from coemployees and supervisors, from drivers invading the freezer and strewing papers about, and from poor production controls. Ben Zarda called a meeting for the next day (September 14).

On September 14, the meeting was attended by Ben Zarda, Larry Brown, Allen Jones, Jim Zarda, and Ripperger. The result of the meeting was that Ben Zarda said Respondent would try to improve its methods; that Ripperger should try to improve his performance; and that 2 weeks thereafter, they should each evaluate the other: Ripperger would determine if he wished to remain; Respondent would decide whether to keep Ripperger.

About 1 week later, Ripperger was called into Plant Manager Tom Zarda's office (Tom Zarda is Ben Zarda's brother). Tom Zarda told him of Respondent's profit-sharing plan, its intent to increase vacation pay, and that Ben Zarda was going to take care of him.

Around the first of October, Ed Zarda, brother of Ben Zarda and Respondent's sales manager, asked employee Dwight Kessler who was then loading his truck, if Kessler had received a union application card. Kessler falsely denied receiving one and Ed Zarda told him he would be getting one. About 1 week later, Kessler asked Ed Zarda for a pay raise. Ed Zarda said: "Let's go down and talk to Ben, he wants to talk to you about this Union thing anyway." They went into Ben Zarda's office.² Ben Zarda explained to Kessler the advantages of working for Respondent, the existing profit-sharing plan, and the insurance plan which was going to be put into effect in the near future. Nothing was said of a pay raise. Ben Zarda also said he did not "appreciate" employees employed by Respondent for only a short time who tried to bring in a union.

² On balance, I credit Kessler's version which appears above. Ben Zarda specifically denied having any such meeting with Kessler wherein union activities were discussed. Aside from Ben Zarda changing his testimony on the witness stand on other points, he demonstrated a particular evasiveness and lack of candor relating to material issues in the case: whether Respondent's "confidence" in its employees, as described in its letter of October 15 to all employees, referred to sparse attendance of employees at an October 13 union meeting of which Respondent learned on October 14; and whether employee Gary Randolph told Ben Zarda of the sparse attendance and of two employees requesting return of their signed union cards. In general, I do not credit the testimony of Ben Zarda. I have, in addition, taken into account that Kessler, at this point in the hearing, was testifying on behalf of his own interest as an alleged discriminatee. Nevertheless, viewing the testimony as a whole, and my observation of the witnesses, I credit Kessler over Ben Zarda insofar as this portion of the testimony is concerned. As will be seen, *infra*, I do not credit all of Kessler's testimony.

³ The parties stipulated: (1) that on or after October 12, 1976, Respondent had knowledge of Ripperger's sympathy for and activities on behalf of

Around October 9 or 10, Ripperger spoke with Union Agent Furman Joye and told him that Respondent's employees wanted to speak to a union agent and find out more about the Union. They agreed that there would be a union meeting on October 13, 1976, at a nearby motel. Ripperger then received from Joye leaflet invitations to the October 13 union meeting and distributed them on the morning of October 12, and posted the invitation on Respondent's bulletin board.³

The leaflet having been posted on the Company's bulletin board announcing a union meeting on October 13, on October 12 at or about noon, Respondent announced that there would be a meeting of employees at 2 p.m. in Respondent's garage. At that meeting, Ben Zarda, the general manager, told the employees, *inter alia*, that they didn't need a union; he compared the Union's contractual profit-sharing plan with the Company's existing profit-sharing plan; told employees that Union Agent Joye was making \$60,000 to \$100,000 a year; permitted his attorney Richard W. Noble, to compare the profit-sharing plan and the union contract with the Company's plan; told employees that they all knew how he felt about unions; told all employees that Respondent's dairy would continue operations regardless of the Union; and told them that dairy companies represented by Local No. 207 were going out of business and that Zarda Dairy was prospering. At the end of this meeting employees were permitted to ask questions. According to employee Dwight Kessler, he recalled Ben Zarda explaining the advantages of the Zarda profit-sharing plan over the Union's profit-sharing plan and spoke of the new insurance plan which Zarda was going to institute.

About 10 minutes after the October 12 meeting was concluded, at or about 3 p.m., Ripperger returned to work. He was notified that an ice cream truck was about to be loaded and went to the office to get the "load out" slip describing the nature of the load. He then was in the process of procuring a "dolly" on which to load the ice cream. Ed Zarda saw him talking to some of the drivers at the loading dock and reported this to Tom Zarda. Tom Zarda came up to Ripperger and told him that he was tired of Ripperger's "bullshit" and, walking behind Ripperger, repeatedly told him to work faster as Ripperger was walking with the dolly.

Ed Zarda testified on this point that following the 1-1/2-to 2-hour October 12 meeting, "at 2:30, 3 or 4 o'clock in the afternoon,"⁴ Respondent wanted to expedite truck-

the Union; (2) at all material times up until the time of Ripperger's discharge on December 3, 1976, Respondent knew that Ripperger was the leading proponent of the Union among Respondent's employees; (3) handbills relating to the prospective October 13 meeting were distributed on October 12 outside the plant and Ripperger placed the same handbill or leaflet on the Company's bulletin board; (4) a union meeting was held at a motel in the Kansas City, Missouri, area on Wednesday, October 13, at which seven employees were in attendance; and (5) a company meeting of all employees was held on October 12 (Tuesday), 1976, about 2 p.m., at which the Union was discussed and there was no prior notice of that meeting given until noon of that day, October 12, 1976.

⁴ When Ed Zarda was asked when he first learned of union activity in Respondent's plant, he answered: "Very late August, I mean September, October." He thereafter placed the distribution of union leaflets as occurring on: "October 3, 4, or 5, I don't know." I regard Ed Zarda as an incredible witness except where I specifically credit his testimony. Although Respondent stipulated that it knew of union activities on and after October

loading. When Ed Zarda went out to the loading dock, he saw Ripperger talking to three drivers,⁵ and saying: "Alright, now you heard Zarda's side of the story, now let's go to the meeting tomorrow night at the Black Angus Hotel and hear our side." I credit Ed Zarda as having heard Ripperger speak to employees on worktime and thereafter report this to his brother, Plant Manager Tom Zarda, Ripperger's ultimate supervisor. I credit Ed Zarda in telling Tom Zarda that there were drivers out at the loading dock waiting to be unloaded or reloaded who are being made "hostile" because of Ripperger haranguing them about the Union and their desire to go home after their normal day's work (4 a.m. to 1 p.m.) or be reloaded for the next day. Ed Zarda did not accompany Tom Zarda when Tom Zarda left him to speak with Ripperger.

Tom Zarda corroborated that Ed Zarda told him Ripperger was detaining the drivers. Tom Zarda, however, did not directly corroborate Ed Zarda mentioning to him that Ripperger was haranguing the drivers about the Union. Rather, he said that Ed Zarda told him that Ripperger was "bullshitting rather than doing his job."⁶ In any event, Tom Zarda told Ripperger: "Mark, I am tired of your shit, let's go to work." When Ripperger asked him what he meant, Tom Zarda answered: "You can do any damn thing you want to on your time . . . but when you're on the clock, let's keep busy doing your job." When Zarda asked him what he was doing, Ripperger told him he was looking for a dolly; and when, walking away, Zarda saw Ripperger still standing there, he said: "Mark, let's go"; and, a third time, "Now let's get moving."

Ripperger subsequently testified in rebuttal. He did not deny Tom Zarda's testimony or deny he had been engaged in solicitation on behalf of the Union with the drivers on worktime. In view of the above circumstances, I credit Ed Zarda and Tom Zarda's testimony that Tom Zarda told Mark Ripperger to cease talking to the drivers on company time about the Union and to engage in work activity. Thus, insofar as paragraph 5(c) of the complaint alleges that Tom Zarda told Ripperger that he was tired of Ripperger's activities on behalf of the Union, constituting a violation of Section 8(a)(1) of the Act, I conclude that it was not and recommend that paragraph 5(c) of the complaint be dismissed.

Ripperger testified without contradiction that, although he did not solicit union membership cards from employees after October 15, his union activities did not cease. He admitted that there was not as much union activity after October 15 as before October 15, but he did talk to employees with regard to the Union and answered questions of employees who came up to speak to him about their interest in the Union.

Following the October 12 meeting of employees called by Respondent, the union meeting was held on October 13 at the Black Angus Hotel. Furman Joye of the union was present along with seven employees. At this meeting, two

employees requested return of their executed union membership application cards. There is no evidence as to whether such cards were returned. However, on the next day, October 14, 1976, employee Gary Randolph, who was at the meeting, reported what had occurred at the meeting to President Ben Zarda, including the number of employees present at the meeting and the fact that two employees had requested return of their cards.

In addition, on two occasions after the union meeting of October 13, Ice Cream Production Supervisor Allen Jones spoke about the Union in Ripperger's presence. On October 14, when Ripperger walked by Jones in the ice cream room, Jones asked Ripperger: "Is the Union done?" Ripperger answered: "No, we are not done. We are going to get them in." The second conversation was in Respondent's "break room" around November 1. Ripperger was talking in favor of the Union. Jones started giving the anti-union side—the "cons about it."

On a day at the end of November 1976, in the morning, while Ripperger and his supervisor, Larry Brown, were working on the ice cream loading dock, Ripperger and Brown passed the office of warehouse clerical (inventory controller) Ed Majewski, employed by Respondent for about 5 years and employed by Respondent at the time of the hearing. Ordinarily, Ripperger, after filling out and executing work orders (load-out slips) submits them to Majewski at the end of each day. The credible evidence shows that as Ripperger and Brown walked by the office, Majewski told Larry Brown that he wanted to speak to Ripperger and asked Brown to leave the area. Majewski then handed Ripperger a piece of paper⁷ when Supervisor Brown left the immediate area of the office. The piece of paper read, according to Ripperger, "You are going to be fired." Majewski gave two versions as to what the slip read. The first version was: "Mark, be careful, you are in trouble. You might be fired." The second version he gave was: "Be careful, you are going to lose your job." Majewski testified that he wrote out the slip just before he handed it to Ripperger, and then changed his testimony whereby he said that he wrote the note 5 to 10 minutes before handing it to Ripperger. Contradicting Ripperger, Majewski testified that he never asked Supervisor Brown to leave and Brown was not even in the immediate area when he gave the note to Ripperger. Majewski admitted, however, that he gave the note to Ripperger while Ripperger was in the hall, rather than in Majewski's office, and he could not explain why he didn't want Supervisor Brown to hear the warning.

Majewski explained that he gave the warning on a piece of paper to Ripperger after hearing Supervisor Brown, commencing 2 or 3 weeks before the December 3, 1976, termination of Ripperger, say that Ripperger made so many mistakes in "loading the load-outs" that he would have to be terminated. Majewski also testified that he heard Brown say on two or three occasions that he would have to fire Ripperger. The last time occurred on the day

specifically complained to Ed Zarda of Ripperger haranguing him after the October 12 meeting about the Union, but this driver was never named.

⁶ As will be seen, *infra*, such fecal epithets appear to have been Tom and Ed Zarda's earthy reference to Ripperger speaking of the Union.

⁷ The piece of paper was not produced at the hearing or its whereabouts otherwise explained.

12, it is unclear when it first learned of them. Ripperger placed his request for union cards as "late September," and his distribution as shortly thereafter.

⁵ Although several drivers employed by Respondent were called as Respondent's witnesses to prove Ripperger to be a negligent employee, indifferent to his work responsibilities, none of them testified that Ripperger solicited them on behalf of the Union on worktime. One driver allegedly

that Majewski actually handed Ripperger the note. Majewski testified that he heard Brown at that time say: "I'm just going to have to let him go." Majewski also testified that he hears many complaints regarding employee work performance and that he never wrote a note like that to any other employee (and never would again), and said that Supervisor Larry Brown complained about Ripperger's performance almost every other day from mid-November until the discharge on December 3, 1976. Finally, Majewski testified, without contradiction, that the following day, Ripperger might have asked him what he meant by the note and Majewski "probably" replied: "It is because of your work." Though called in rebuttal, Ripperger did not contradict Majewski's testimony with regard to Majewski's explanation, on the next day, of what he meant by the note.

B. Testimony of Employee Jerome Menke

Menke, employed by Respondent in the shipping and receiving department since July 4, 1974, testified that the day after the union meeting on the highway, on October 13, 1976, i.e., on October 14,⁸ he spoke with Mark Ripperger in the plant and then went into the break room to take his work break. Sales Manager Ed Zarda, not Menke's supervisor, came up to him and asked Menke: "Is Mark still hustling?" Menke answered: "Yes." Ed Zarda then left the break room, went into a nearby office and made a telephone call. Menke heard him say on the phone at that time: "Mark is still up to the same old shit."

C. Mark Ripperger's Pay Raises

Ripperger received three pay raises in the 7 months he was employed by Respondent: The first in June after 30 days (a 25-cent-per-hour raise, \$3.25-\$3.50); the second in August 1976, at the conclusion of 90 days (25-cents-per-hour raise, \$3.50-\$3.75); and the last in November 1976 (50 cents-per-hour raise \$3.75-\$4.25). At that time, the uncontradicted evidence shows that Tom Zarda told him "We had our problems worked out"; that there would be a further raise of 25 cents per hour on January 1. The evidence is in dispute regarding whether the 30- and 90-day raises are fully "automatic."⁹ In any event, Tom Zarda testified that it took a great deal of convincing by Larry Brown, Ripperger's supervisor, to give him the 50-cent-per-hour raise at all, and that the raise was given on the ground that it might change Ripperger's "attitude." As will be seen hereafter, Ben Zarda testified that the raise had nothing to do with merit and that it was given automatically in order to bring the employees up to a pay scale of \$1,200 per month. Thus, Dennis Brown, an employee hired at the same time as Ripperger, was given only so much of a raise as to bring him up to \$4.25 an hour (a 25-cent-per-hour raise) whereas Ripperger was given a 50-cent-per-hour raise to bring him up to the same \$4.25-per-hour level. In its brief, Respondent, supporting Ben Zarda's testimony, insists that the November 1, wage increase was not based on merit, but was for the purpose of raising Respondent's wages to meet inflationary increases in the economy (Respondent's brief). Respondent's financial consultant,

⁸ October 14, the day after the union meeting, is the day Supervisor Allen Jones asked Ripperger if the Union was "done"; and the day on which employee Gary Randolph reported to President Ben Zarda the result of the union meeting.

Dr. Fred Allvine, does not entirely agree with Ben Zarda and testified that the pay raise of November 1 was to some extent a merit increase.

D. The Discharge of Ripperger on December 3, 1976

The evidence is undisputed and Ripperger admits that on December 2, 1976, he forgot to load on the trailer truck cases of a type of ice cream known as Bavarian, packed in one-half gallons. It is also undisputed that on Thursday, December 2, Supervisors Brown and Jones, after the discovery that the December 2 shipment had not gone out, cautioned Ripperger and two other loading employees, Gary Randolph and Dennis Brown, who, on a part-time basis helped Ripperger remove the ice cream from the freezer and place it on the lift in the cooler room, to be sure that the "Bavarian" ice cream went out on the next day, Friday, December 3, 1976.

On December 3, 1976, it is undisputed that the Bavarian half gallons were not loaded on the truck again. Ripperger admits that he forgot to load them. It is also undisputed that Gary Randolph, at or about 9 o'clock, when Supervisor Larry Brown reported for work, told him that Ripperger had forgotten to load the Bavarian half gallons again, and that Ripperger, taking the matter as a joke, told Randolph that Respondent could always make a special delivery of the ice cream by its van. It is also undisputed that at or about 9 o'clock, after discussion with Supervisor Larry Brown about the failure to load the Bavarian half gallons and another dolly of ice cream, Ripperger ran after the truck in an attempt to flag it down to permit its loading. The truck, however, had already gone.

Gary Randolph testified that he waited until about 9 o'clock when Supervisor Larry Brown arrived for work to tell Brown what happened (the above loading took place commencing at or about 6 a.m. and ordinarily was finished some time after 8 a.m.). He told Supervisor Brown that while the ice cream truck was already loaded, but still at the loading dock, he told Ripperger: "You forgot the Bavarian. Aren't you going to put it on the truck?" Ripperger answered: "Well, it will all work out . . . they can make a special run if they want to." Respondent maintains a small van with a special driver. The van delivers to stores to fill emergency shipments.

Ripperger testified that he and employees Gary Randolph and Dennis Brown were all responsible for the loading of the Bavarian half gallons. The testimony of Jim Zarda demonstrates that Ripperger had only secondary responsibility for the loading of half-gallon and 3-gallon ice cream containers and that Ripperger's primary responsibility was the loading of novelties.

The evidence is also clear that employees often make mistakes in loading and shipping. Majewski testified that he always received complaints from the drivers about loading mistakes, and that not a day goes by without loading mistakes, most of them small mistakes. Similarly, employees Pankey, Kessler, and Menke also testified that employees make mistakes, big and small, in loading on a consis-

⁹ Menke testified, without contradiction, that his wage increase, 7 months after he commenced work, came about only because he asked for it.

tent basis and are never punished for such mistakes, although they are told to do better next time. The evidence in this record shows that no employee was ever given a warning or threat of discharge or other discipline for having made a mistake in loading. Indeed, employee Menke testified that on more than one occasion employees had forgotten to "bar-in" a truck loaded with milk. When a truck loaded with milk is not "barred-in," when the truck starts off, the milk falls all over the truck. Menke testified that there was no discipline meted out on the occasions of the failure to "bar-in."

Dwight Kessler testified, without contradiction, that he forgot to put items on the loadout sheet (resulting in a failure of the actual loader to load the items on the truck) around three to four times a month. When the load went out and the customer did not receive the goods, ordinarily a call would be made to Respondent and Respondent would send out a truck to take care of the customer. Kessler testified that all that the supervisor would do would be to remind him that he had forgotten the item and that the material had to go out and be run out on a "special." He had never received any warning because of such conduct. He also testified that on occasion he forgot to place items on the loadout sheet on several days in succession and that the matter was ultimately taken care of without a suggestion of discipline. Ed Zarda told him on these occasions that the special runs of the van are expensive. Kessler testified that the last times that he had multiple failures to place items on the loadout which required special deliveries by van occurred within 6 months of the hearing.

Ripperger testified that no employee he had ever known had been warned or even "chewed out" for their mistakes in loading; and certainly there had not been any warnings of discharge. The procedure was that the employees would merely advise the supervisor of the error; the error would be conveyed "upstairs" and a van would usually go out with the ice cream on a special run. Gary Randolph testified that if an item is forgotten, the van makes a special trip to the stores. Gary Randolph testified that he never heard of an employee being fired for improper loading. Randolph has been employed by Respondent since 1969.

When Ripperger told Brown that he had again forgotten to load the Bavarian half gallons on December 3, 1976, Brown became very upset and told him he was getting things all screwed up. Ripperger told Brown that it was as much Gary Randolph's fault as his own. The evidence shows, however, that Randolph's and Brown's responsibility was to help Ripperger get the ice cream out of the freezer and into the "cooler" room, and that it was Ripperger's particular responsibility to get the ice cream up on the lift, then into the cooler room and then to the loading dock for loading on the trucks.

Supervisor Brown testified that 5 minutes before he fired Ripperger on December 3, he gave him the reasons for the firing. However, he first spoke to Supervisor Tom Zarda regarding his intent to fire Ripperger and Tom Zarda told him that he, Larry Brown, was the supervisor and it was his responsibility. Brown testified that he fired Ripperger for four reasons—the four reasons being: (1) Ripperger's failure to load the Bavarian half gallons with no excuse therefore; (2) Ripperger's poor attitude which was subject of

constant warnings by Brown; (3) sloppy housekeeping in the freezer department; and (4) shortages in loading the ice cream trucks on a constant basis with regard to the wholesale route drivers. Brown also alleged that he received complaints about Ripperger's constant cursing to the drivers. Subsequently, Brown withdrew this as a reason for terminating Ripperger. He also testified that on several occasions in mid-November, he told Ripperger that if his work didn't improve, he would be discharged. At that time he mentioned the reasons given to Ripperger: shortages in loading, poor housekeeping, and omitting goods from the trailers. Ripperger denied any such warnings.

The evidence, notwithstanding Ripperger's denials, shows that Ripperger did have shortages in the loading of ice cream trucks of Respondent's wholesale route drivers and there is evidence that drivers Sims and Pankey complained about such shortages. Such shortages, according to Ed Majewski, as above-noted, are common and the complaints of shortages by route drivers is an everyday occurrence. Since not all of the shortages were attributable to Ripperger, and since no employee was ever discharged because of such shortages, I cannot take Ripperger's conduct in creating such shortages as a serious matter.

Ripperger admits that there were papers strewn about the freezer, but alleges that his housekeeping was not at fault, but rather, it was drivers who went into the freezer department, opened cartons of ice cream, and threw papers about on the floor. Respondent failed to offer contrary testimony on this point.

Ripperger denied having a poor attitude and denies that he was ever the subject of any warnings of discharge or other discipline by Brown. Ripperger admits only the failure to load the Bavarian half gallons, and that he also found, on December 3, that he failed to load other ice cream as well. It is undisputed that on December 2 Supervisors Larry Brown and Allen Jones told Ripperger and Randolph to be sure that the Bavarian half gallons went out on December 3.

On December 3, after Gary Randolph told Larry Brown that the Bavarian half gallons had been left off the truck, even though Ripperger had the opportunity to load it on the truck, and that Ripperger said that Respondent should send out the van for purposes of making delivery, Brown told this to Tom Zarda and Zarda told Brown to handle the matter. Brown says that he then returned and spoke to Ripperger, who not only could not give an explanation for having omitted the Bavarian half gallons, but also discovered omitting a loaded dolly of goods for one of Respondent's stores. In addition, Brown said that Ripperger laughed under his breath and told him, "If you don't like it, why don't you fire me?" At that point Brown said "all right, you're fired."

Ripperger specifically denies laughter, silence, or otherwise, and denies asking to be fired.

Brown testified that he alone made the decision to fire Ripperger and that Tom Zarda left it up to him.

Ripperger testified that when he told Brown of his failure to load the dolly for the store in addition to failing to load the Bavarian half gallons, Brown became extremely angry and told him, "I'm sorry, there's nothing I can do. As far as I'm concerned, you're fired."

Thus, Ripperger was terminated on Friday, December 3, 1976.

On the following Monday, December 6, 1976, Ripperger returned to Respondent's premises to pick up his paycheck. He spoke with Supervisor Jim Zarda. He asked Jim Zarda whether he was actually permanently terminated. Jim Zarda agreed to speak to Ben Zarda and Tom Zarda. Tom Zarda said he would not overrule Supervisor Larry Brown. Jim Zarda told Ripperger: "If everyone was fired for their mistakes [at Zarda], there would be nobody here." James Zarda admits making this statement, but said that when he told this to Ripperger, he was only trying to make Ripperger feel good. Whether said to make Ripperger feel good or not, Jim Zarda's statement confirms and corroborates Respondent's attitude toward mistakes in loading.

Jim Zarda also testified that Larry Brown was his subordinate.¹⁰ If Brown had "serious problems," Brown was to report to Jim Zarda, who tried to work them out. The evidence fails to show that Jim Zarda, supervisor over Larry Brown and thus over Ripperger, was ever consulted on Ripperger's discharge. He testified he never asked Brown why Brown fired Ripperger. Jim Zarda testified that he did not regard Brown's firing of Ripperger to be a "serious" matter.

The testimony of Respondent's supervisors is that Ripperger was a poor employee whose performance became consistently worse in the period at least from August 1976 to the time of his discharge on December 3, 1976. The only supervisor who testified that he warned Ripperger that he might be discharged if his work did not improve was Larry Brown. Ripperger denied any such warnings. I do not credit Brown's assertions over Ripperger's denials of such warnings. Instead, I credit on this point the testimony of Gary Randolph, a witness called by Respondent, obviously hostile to Ripperger, who testified that at least until in or about November, Ripperger's performance as an employee was good. Nevertheless, the testimony of Supervisors Allen Jones and James Zarda, together with the testimony of employees Gary Randolph and Dennis Brown, which testimony I credit, shows that since September 1976, Brown and Randolph had been complaining that Ripperger had not been giving them help in removing ice cream from the freezer and placing it into the cooler and then on to the lift. They testified that Ripperger would not help them and was never available in the area when work was to be done. Jones testified that Ripperger had been accusing him of having too much production being placed in the freezer. He in turn continually reminded Ripperger that he was not helping Randolph and Brown in loading the half-gallons.

In particular, Gary Randolph testified that although Ripperger had been a good employee with a good attitude when he was first hired, his attitude changed at about the

time he had become interested in union activities. Randolph testified, and Ripperger did not deny, that Ripperger had told him that he had been employed by Zarda longer than Larry Brown and that he, rather than Brown, should have been made supervisor. Randolph complained to his supervisor, Allen Jones, that Ripperger did not help in the loading of ice cream and that these complaints started around September and lasted until shortly before Ripperger was fired. Supervisor Allen Jones told Randolph that he would take care of the complaints, but nothing ever happened. Randolph's testimony shows, and Ripperger's testimony supports, the conclusion, that Ripperger on more than one occasion failed to help Randolph and Dennis Brown, and that they failed to help him, because each side believed that the other was not rendering enough assistance to the other party. Thus, in mid-November 1976, Supervisor Allen Jones found Ripperger drinking hot chocolate in Jones' office with Ripperger's feet up on the desk. Jones testified that at that time Ripperger should have been helping Randolph and Dennis Brown in the loading of ice cream. Ripperger refused to help them because they had refused to help him. Jones angrily told Ripperger to get to work. On the basis of Ripperger's inexact explanation, I credit Jones in having found Ripperger with his feet up on the desk drinking hot chocolate and refusing to help Dennis Brown and Gary Randolph load. I also accept, but do not find material, Ripperger's explanation that he did so because Brown and Randolph had refused to help him. On the other hand, Respondent failed to produce any evidence of a warning of discharge to Ripperger or any other employee because of such, or similar, conduct. For such conduct, one or all parties could have been expected to be disciplined. Nothing happened.

E. Discussion and Conclusions Regarding the Discharge of Mark Ripperger

The evidence shows that, at least commencing shortly after the end of August hiring of Larry Brown as a supervisor, Ripperger's attitude as an employee, his complaints against Respondent's production procedures and insurance plan, and his grudging helpfulness of other employees in performing their common tasks of loading ice cream trucks, did not make Ripperger an ideal employee.¹¹ Rather, there is evidence that he was particularly interested in organizing the employees on behalf of the Union and that he was perhaps disgruntled because Respondent's production practices overworked him and he was not made a supervisor. Thus, there is evidence that Respondent's production of ice cream was too great for the storage facilities in the freezer and that Ripperger did not hesitate to inform Respondent's president and general manager, Ben Zarda,

¹⁰ The transcript shows:

- Q. Was Larry Brown your subordinate?
 A. Yes, sir.
 Q. You never inquired of your subordinate why he fired an employee?
 A. Well, like I said, after Larry [Brown] took over the job, he was more or less in charge of ice cream by himself.
 Q. Was he your subordinate?
 A. Not really, no.
 Q. Did he report to you?

- A. No, he did not.
 Q. You testified . . . that if Brown had any problems, he would come to you with them?
 A. Yes, he was to come to me with problems if he had problems. I'm talking about serious problems . . .
 Q. And the firing of Ripperger was not a serious problem?
 A. No, not as I could see it because, like I say, he [Brown] was in charge of ice cream. It was his responsibility.

¹¹ The Act protects cranky employees and does not remedy the actions of harsh, hostile, and improvident employees.

of his unhappiness with being overworked and his unhappiness with Respondent in general. Moreover, the evidence also shows that regardless of fault, Ripperger could not and did not get along as a cooperative employee with Randolph and Brown. However, the evidence also shows that Randolph and Brown were not cooperative with Ripperger in the loading of ice cream, which was their mutual job and responsibility. Ripperger was retained as an employee and, on or about November 1, given a substantial wage increase.

There is no question that Ripperger, on December 2 and 3, forgot to load the Bavarian half gallons on Respondent's trucks and that the loading of such products was particularly brought to his attention by Randolph and his Supervisor Larry Brown. I conclude that responsibility for actual loading of the half gallons as well as the novelties on December 2 and 3 was on Ripperger, but that Gary Randolph knew as late as 8 o'clock in the morning, while Respondent's truck was still at the loading dock, that the Bavarian half gallons had not been loaded. Instead of loading them himself, he engaged in conversation with Ripperger who refused to load the truck and suggested that the load go out by special van. Thereafter, Gary Randolph awaited the arrival of Supervisor Brown¹² and informed him of Ripperger's conduct. There is a conflict in the testimony with regard to Ripperger's actions upon being informed that the failure to load the Bavarian half gallons, but since Randolph, who left the loading dock for the production area at 8 a.m., was not continually present at the loading dock, I find, as Ripperger testified, that Ripperger ran after the truck and tried to stop it after he spoke with Brown at or about 9 a.m. I also conclude that Ripperger, as Gary Randolph testified, said that a van could be sent out to make up for the oversight.

While I have not credited Larry Brown's testimony with regard to Ripperger's laughing at him during the discharge conversation or that Ripperger requested that Brown fire him if he didn't like what he had done, and while I credit Ripperger on this matter, I conclude that there was a clear basis on which the discharge of Ripperger could have been lawfully motivated: Ripperger's failure to work with other employees capped by his repeated failure to ship the Bavarian half gallons; and, his apparent generalized insolence in his relationship with Supervisors Allen Young and Larry Brown.¹³

There is no question, on the basis of Respondent's stipulation, that Respondent knew that Ripperger was the chief proponent of the Union. There was also no dispute, on this record, that Respondent was hostile to the Union and, therefore, hostile to Ripperger because of his union activities. While it is true that the Board has repeatedly held that if an employee provides an employer with sufficient cause for discharge by engaging in conduct for which he would have been terminated in any event, the Board will not find the discharge unlawful because the employee also engaged in union activity, *Klate Holt Company*, 161 NLRB 1606 (1966); and while the mere fact that an employee is or was participating in union activities, it does not shield him from lawful discharge; the question of motive for the discharge

must be gleaned from all the circumstances in the case, a very delicate task, *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300, 311 (1965).

General Counsel's *prima facie* case, on the other hand, would seem to consist of: (1) Ripperger's notorious union activities—indeed Respondent admits Ripperger was the chief union supporter and so known to it; (2) Respondent's open union animus, as demonstrated by the conversations with employees, its independent violations of Section 8(a)(1) of the Act, *infra*; (3) Ripperger's record of wage increases, the last one being in November 1976 with a promise of a further increase in January 1977; (4) the disparate treatment of Ripperger, i.e., errors, even large multiple errors were not uncommon and no other employee on this record was ever discharged or even disciplined for repeated errors in loading—the evidence shows, moreover, that error-prone employees (testimony of Menke, Randolph, and Kessler) remained in Respondent's employ despite loading errors and, as the Charging Party points out, despite drunkenness and failure to perform assigned work (C.P. Exhs. 1-5); and (5) the apparent triviality of "loading errors" as seen by Respondent's own supervisors (Jim Zarda). I am also impressed by the fact that Tom Zarda, when approached by Larry Brown with the suggestion on December 3, to discharge Ripperger, preferred to take no part in the discharge, and that Jim Zarda, supervisor over Larry Brown, shunned any inquiry into or responsibility for the discharge.

The evidence which particularly stands out, in the light of Respondent's clear union animus, is the uncontradicted testimony regarding Ed Zarda's October 14 telephone statement, following his unlawful interrogation of Jerome Menke in the break room ("Is Mark still hustling?"). The interrogation itself was designed to determine if Respondent, particularly by its October 12 preemptive employee meeting in the garage—wherein it told of the new employer insurance plan—had effectively dampened union activity. On the morning of the same day, October 14, Gary Randolph told Ben Zarda that only seven employees attended the October 13 union meeting. Again, on the same day, Allen Jones, interrogating Ripperger, asked him if the Union was "done." Here, on the same day, Ed Zarda inquired whether, in particular, Ripperger's union activities were diminished by the October 13 rebuff at the union meeting. His animus, upon learning that Ripperger was still "hustling," was apparent. Although the recipient of the call is unknown, it is clear that Ed Zarda was advising a party concerned with Ripperger's union activities, the baleful intelligence: "Mark is still up to the same old shit." Since the discharge was 6 weeks later (December 3, 1976), I find the above evidence especially persuasive that not only was Respondent's union animus unabated, despite President Zarda's testimony that union activity was a matter of his interest only insofar as that it was a chronic condition, but that Ripperger's union activity was a source of constant irritation at the highest levels. Under such circumstances the 6-week hiatus is not crucial.

¹² As Brown testified, he was not Ripperger's supervisor in the early morning. Allen Jones was.

¹³ On Ripperger's uncontradicted testimony that poor housekeeping in

the freezer was caused by drivers, I reject this reason as a basis for discharge. Similarly, as noted, *infra*, the failure to twice load the Bavarian half gallons would not provide a basis for discharge, standing alone.

The evidence is uncontradicted that no employee was ever fired for loading mistakes and employees who repeatedly made mistakes are (Menke, Kessler, and Randolph) still employed, including Larry Brown. Moreover, Jim Zarda truthfully confirmed the lack of gravity attached to such mistakes—even multiple loading mistakes—in filling orders: “If everyone at Zarda was fired for their mistakes, there would be nobody still employed.” Of the two employees previously working in Ripperger’s job in the freezer, one quit because the work was too onerous; the other did not come to work at all. Work in the freezer is particularly difficult.

It must also be noted that none of the Zarda brothers, or Jim Zarda, Supervisor Larry Brown’s superior, took any responsibility for or, indeed, had knowledge of the discharge. To the contrary, each did not have knowledge of the firing, shunned participation in the firing, or refused to overrule Brown’s decision when consulted. Jim Zarda’s testimony that Ripperger’s discharge was not a “serious” matter was incredible. Tom Zarda specifically refused to take any responsibility even when Larry Brown first told Tom Zarda of his intent and reasons for firing Ripperger. Had Tom Zarda inquired as to the basis for the discharge, and asked further who was responsible for the loading, and whether, even if Ripperger had failed to load, any other employee knew of the failure to load before the truck went out, he would have discovered that Gary Randolph was knowledgeable in the area and could have loaded the truck before it went out. In any case, by avoiding responsibility, he avoided the necessity for an investigation.

As the Board said in *Firestone Textile Company, a Division of Firestone Tire & Rubber Company*, 203 NLRB 89, 95 (1973):

The Board has consistently held that an employer’s failure to conduct a full and fair investigation of an employee’s alleged misconduct is evidence of discriminatory intent, especially when viewed in light of the employer’s union hostility. *Norfolk Tallow Co., Inc.*, 154 NLRB 1052, 1059; *Shell Oil Company v. N.L.R.B.*, 128 F.2d 206, 207 (C.A. 5, 1942); *J. W. Mortell Company*, 168 NLRB 435, 452, *enfd.* with modifications 440 F.2d 455, 458 (C.A. 7, 1971).

Thus, Tom Zarda’s failure to investigate the discharge of the known union proponent, together with his and Jim Zarda’s (Brown’s supervisor) piling the full responsibility on Larry Brown, whose supervisory capacity covered only one employee, Mark Ripperger, insulated Tom Zarda, Jim Zarda, the dock manager, and Respondent from discovery that others either had responsibility for the failure or, having no responsibility for the failure, fully knew of the failure and could have avoided same by reasonably prompt action. In such a case, discipline would have to be dealt out to Gary Randolph, an informer against Ripperger and the Union.

¹⁴ The inference I do draw, however, is that the decision to discharge Ripperger was made at the end of November and thus before the incidents of December 2 and 3, 1977. Majewski testified that in November he heard

1. Majewski’s note

Majewski’s late November note to Ripperger indicates that Majewski heard by late November that Ripperger’s job was not only in jeopardy but that the decision was already made to discharge him. Ripperger said the note read: “You are going to be fired.” Majewski, as above-noted, gave two versions of the same note: “Mark, be careful, you’re in trouble. You might be fired,” and “Be careful, you are going to lose your job.”

Ripperger’s version and Majewski’s second version speak to a substantially unconditional loss of the job in the future—thus the decision having already been made. Majewski’s first version has a conditional ring about it—“You might be fired.”

Majewski testified, and Ripperger did not deny, that the day after the note was passed, they had a conversation regarding the note. The conversation, as Respondent points out, refers to Majewski having heard continuous complaints from Supervisor Larry Brown regarding Ripperger’s work, culminating on the day he wrote the note, when Larry Brown came into the office and said: “I’m just going to have to let [Ripperger] go.”

I was particularly dissatisfied with Majewski as a witness. His testimony regarding whether he discussed the note with Ripperger was filled with “I thought so[s],” and other conditional statements. Of greater significance, he was unable to keep straight (a) when he first heard Larry Brown threaten to fire Ripperger and (b) when he wrote the note.

As to (a), Majewski testified that it was a matter of several days before he wrote the note that the first threat occurred. He also placed it at 2 or 3 weeks before he wrote the note.

As to (b), Majewski testified that he wrote the note to Ripperger about 5 minutes before he passed it to him. He also testified that it might have been a one-half hour after he wrote the note that he saw Ripperger.

While I do not doubt that Brown complained to Majewski about Ripperger’s work habits—indeed, as Respondent points out, Brown told Pankey on several occasions that he would have to do something about Ripperger’s continual shortages and was complaining every other day to Majewski on account of Ripperger’s “big mistakes,” I do not credit Majewski’s *post facto* reasons for passing Ripperger the note. His recorded hesitancy, conditional, and inconsistent testimony, does not fairly demonstrate that he is a credible witness.

On the other hand, I reject General Counsel’s request that I draw an inference that the purpose of the note was for a reason other than Ripperger’s job performance. Though perhaps permitted to do so, I am unwilling, on this record, to infer the opposite of Majewski’s testimony and, indeed, that Ripperger’s union activities caused Majewski to write the note. Majewski testified that he heard nothing regarding terminating Ripperger for union activities, and although his testimony, appearing in the footnote below, creates suspicions, I will not infer the opposite.¹⁴

Supervisor Brown say: “He had made another mistake, look at here all the mistakes, I am just go (sic) to have to do something, I am afraid I am going to have to let him go.” There is no evidence of any particular Ripperger

Yet, I take into account that Larry Brown was announcing over a period of weeks, to various nonsupervisory employees, his dissatisfaction with Ripperger (and allegedly his intent to fire him). While it is possible that a supervisor would do so in order to have his declarations filter down to the employees, I do not credit Larry Brown's testimony that, on several occasions he threatened to discharge Ripperger.¹⁵ Not only did Ripperger deny any such warnings of discharge, but Brown said that the last warning of discharge was on the day before the actual discharge. The warning of discharge was:

I just told him that he left the Bavarian [ice cream] off the ice cream trailer and we had a responsibility to see that it got on there and we needed to get it correct and he said he would correct it.

Q. Did you say if this happens again you are going to get fired?

A. No, sir.

Q. You just said "... we have responsibilities?"

A. "Right."

Q. Is that in your mind a warning of discharge?

A. I would say it would be.

Such statements do not, it seems to me, constitute a warning of discharge.

2. Respondent's defenses

Respondent's defenses to the allegedly unlawful discharge is that Mark Ripperger was discharged for cause: (1) failure to load the Bavarian half gallons on 2 successive days; (2) continuous sloppy housekeeping in the freezer; (3) poor attitude and insubordination; and (4) long history of shortages in loading the wholesale route drivers.

In view of Respondent's evident position that Ripperger was a chronically poor employee because of poor working habits, uncooperative attitude toward coemployees, and lapses of accurate execution of loading trucks, I find that the 50-cent-per-hour wage increase, as late as November 1976, to be evidence completely incompatible with general and consistent Respondent dissatisfaction with Ripperger's performance and a preliminary to discharging him. At least through the beginning of November 1976, when Plant Manager Tom Zarda gave Ripperger the 50-cent-per-hour increase at Supervisor Larry Brown's recommendation (allegedly to help Ripperger's "attitude," if Tom Zarda and Supervisor Larry Brown are to be credited, but merely to bring Ripperger up to the \$1,200-per-month level, if Ben

errors in November, contrary to Majewski's testimony. No testimony of any such errors came from Respondent's witnesses except Brown's daily complaints to Majewski. If the decision to discharge Ripperger was made before the December 2 and 3 incidents, the failure to load Bavarian half gallons becomes pretextual. Majewski testified that he first heard Brown threaten to fire Ripperger 2 to 3 weeks before he wrote the note. Thus, the first threat would have occurred within a couple of weeks after Ripperger was given a 50-cent-per-hour wage increase. No evidence was adduced to show what Ripperger did or failed to do between on or about November 1 and 15 which would merit a threat of discharge made by Brown.

¹⁵ General Counsel states that no supervisor testified that Ripperger was warned he would be fired or discharged. She is in error. Brown clearly testified on the point.

¹⁶ The credibility resolution on this point, unfavorable to Respondent, is not at all helped by employee Donald Pankey's testimony that a few hours after the discharge, Larry Brown told him that he fired Ripperger because

Zarda is to be credited), I conclude that this wage increase rebuts and nullifies the existing controverted testimony of Ripperger's past inadequacy as an employee, including James Zarda's testimony that as early as August 1976, he recommended Ripperger be discharged. The wage increase, more than that received by other employees, is credible evidence that, whatever Ripperger's shortcomings, Respondent did not view them as dispositive. Moreover, Respondent's argument, if Ben Zarda, and not Tom Zarda, is credited, that the wage increase, meant merely to bring Ripperger and other employees up to the same pay level and was not a merit increase, is misplaced. Not only did Respondent's financial consultant, Dr. Allvine, state that the wage increase, "to a limited extent" was a merit increase, but the actual issue is not whether Ripperger was an outstanding employee who deserved a merit increase, but whether the wage increase was evidence that Respondent believed he should be retained at all. A 50-cent-per-hour increase, more than that received by other employees, demonstrates that Respondent believed that Ripperger should be retained as an employee. While such an increase, in other circumstances, would not be a *per se* argument in rebuttal to Ripperger's deficiencies, it disposes of Ripperger's alleged grievous deficiencies as an employee under the present facts through November 1, 1976, insofar as Respondent's intent to retain Ripperger goes.

With regard to the direct insubordination and inflammatory remarks made by Ripperger to Supervisor Larry Brown when Larry Brown remonstrated against the repeated Bavarian half-gallon oversight ("Why don't you fire me?") I credit Ripperger's denial that this ever happened. Moreover, Brown testified he fired Ripperger because Ripperger did not do his job right—especially Ripperger's poor housekeeping, not because Ripperger missed the Bavarian half gallons twice in a row.¹⁶ I conclude that even if the decision to discharge Ripperger was not made prior to December 3, the failure to load two Bavarian half gallons was a pretext covering Respondent's unlawful motivation.

From the above strong *prima facie* case, including Respondent's pervasive union animus, and some serious defects in Respondent's defense, including the poor credibility showing of some of its witnesses, I conclude that Respondent desired to rid itself of Ripperger as an employee; and that while he was sometimes uncooperative with other employees (Sims, D. Brown, and Gary Randolph); occasionally belligerent to supervisors (Allen Jones—to whom he said he would help Brown and Randolph "when I get time"), one of the reasons was because of his apparently

(a) Ripperger forgot the Bavarian ice cream on Pankey's truck; and (b) Ripperger said "if you don't like it, fire me." As to (a), Pankey's testimony directly contradicts Larry Brown's ("and you fired him, did you not, because of what happened two days in a row with the Bavarian one-half gallons? A. No sir"). As to (b), I do not credit that Brown ever heard that remark from Ripperger because it is inconsistent with contemporary events, including Ripperger's evidently guilty behavior in running after the truck in the vain hope that it had not left the dock and in his further discovery that he also failed to load the dolly of ice cream for Respondent's store No. 8. I do not believe that in the face of Brown's ensuing anger, Ripperger would have dared Brown to fire him.

With further regard to both (a) and (b), I infer that Pankey, Respondent's witness, who as General Counsel pointed out, was apparently accused of stealing, might be an accommodating witness for Respondent's cause. I am unable, therefore, to credit Pankey's other recollections of being present when Brown reprimanded Ripperger.

unquenchable sympathy for and activities on behalf of the Union.

That does not dispose of the matter. For, assuming such an unlawful motive, the question remains whether Ripperger's conduct of December 2 and 3, 1976, provided Respondent with a lawful basis to discharge Ripperger. Thus, the question is whether Ripperger's conduct provided Respondent with an opportunity to show that he had "stepped over the line" and was discharged for an act for which he would have been discharged in any event. *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966); *T. V. Cable of Savannah*, 218 NLRB 838 (1975).

I conclude that a reason for the discharge was union activities and that his conduct on December 2 and 3, at most, provided Respondent with a pretext for the discharge.

(a) No employee of Respondent had ever been discharged for mistakes in loading or shipping.

(b) Tom Zarda refused to participate in the discharge even when Larry Brown directly consulted him on the point. Investigation would have shown that Gary Randolph had the last real chance to load the Bavarian half gallons. Punishment of Randolph would have meant punishment of the employee who informed Respondent of the Union's disastrous showing at the union meeting of October 13.

(c) Larry Brown gave inconsistent reasons for the discharge: Was the failure to load the Bavarian half gallons the chief reason for the discharge or were other reasons the ultimate reasons for the discharge.

(d) I specifically discredit Brown's testimony, and credit Ripperger's denial, wherein Ripperger allegedly dared Brown to fire him.

(e) Concluding that the events of December 2 and 3 were seized upon by Respondent as a pretext to get rid of Ripperger, I regard the crucial exchange is between Tom Zarda and Larry Brown on December 3. After Brown became angered over Ripperger's failure to load the Bavarian ice cream the second time, to load the ice cream for store No. 8, and believing that Ripperger was not taking the matter seriously enough (and, indeed, Ripperger was allegedly secretly laughing at him), he consulted Tom Zarda, and told him of the successive failures to load the Bavarian half gallons. Tom Zarda told Brown he was Ripperger's supervisor and to "handle it." The record is barren on whether Supervisor Brown told Tom Zarda of Randolph's participation in the matter.

Thus the evidence shows Tom Zarda reminding Brown of his supervisory power, seeing Brown angered, knowing Brown had supervisory authority over only one employee, Mark Ripperger, and seizing upon the opportunity to have Brown¹⁷ discharge Ripperger independent of any union activity, with Tom Zarda playing no part in the discharge. The problem here is that Tom Zarda gave Brown his head because he (Tom Zarda) saw an opportunity to get rid of Ripperger for "cause" — for failing to load the Bavarian

half gallons 2 days in succession—which is the only reason Brown gave to Tom Zarda for the discharge and the only failure that Ripperger was guilty of. But many employees failed to load items on many occasions—Kessler, Menke, Randolph, and D. Brown, and they were not even reprimanded, much less fired. Tom Zarda telling Larry Brown to "handle it" (after hearing the angry Brown say "We just could not live [with] this") was a signal to discharge Ripperger. Thus, even if Larry Brown's desire in firing Ripperger did not include any unlawful motive, Larry Brown was being used as a cat's paw by Tom Zarda, who saw and seized on the opportunity.

I therefore conclude that the discharge of Mark Ripperger violated Section 8(a)(3) and (1), as alleged, because Tom Zarda would not have permitted Ripperger to be discharged by Supervisor Larry Brown but for Ripperger's union activities. Cf. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), 45 U.S.L.W. 4079, cited by Respondent.

F. Independent Violations of Section 8(a)(1)

(1) Paragraph 5(a) of the complaint alleges that in violation of Section 8(a)(1) of the Act, on or about October 7, 1976, Supervisor Ben Zarda told an employee (1) that there would not be a union at the Respondent's facility as long as Ben Zarda was president, thereby indicating the futility of attempting to organize Respondent's facility; and (2) that the people behind the Union would be walking the streets. Respondent denies the allegations. Paragraph 5(b) alleges that on or about October 7, Supervisor Ed Zarda unlawfully interrogated an employee whether the employee received a union authorization card.

General Counsel relies solely on the testimony of employee Dwight Kessler with regard to these allegations; Respondent, on Ben and Ed Zarda.

Paragraph 5(a)(1), above, is supported by no evidence of record from any witness. I shall therefore recommend that it be dismissed.

(2) Regarding paragraph 5(a)(2) and 5(b), Kessler testified that, around the first of October 1976, after he received a union card from Mark Ripperger, and while loading his truck, Ed Zarda held up a union card and asked him if he had such a card. Kessler said that he answered "No" and Ed Zarda told him that he would be getting one. Ed Zarda testified that Kessler came into his office where drivers had left union pamphlets on his desk and he remarked that: "I see you have one of these." When Ed Zarda said that the Union had not given him any, Kessler said that the Union had not given him one. Zarda said that Kessler would get one in the future and would have gotten one that morning if he had parked his car in the designated parking place. If Ed Zarda is credited, there is no violation; if Kessler, there is.

In the absence of other witnesses, the credibility issue is between Kessler on one hand (who truthfully admitted that

¹⁷ Brown, however, testified that he was *not* Ripperger's supervisor in the early morning because he does not arrive until 10 a.m. Allen Jones was Ripperger's supervisor from 6 a.m. to 10 a.m. Whereas Jim Zarda testified that after Larry Brown was made supervisor over Ripperger at the end of August and that he, Jim Zarda, had no further responsibility for Ripperger's work performance, yet, as late as September 13, according to Ben Zarda's

testimony, Jim Zarda was complaining of Ripperger's poor housekeeping to Ben Zarda. Jim Zarda was the supervisor, approached by other supervisors, for redress relating to Ripperger's allegedly poor performance. Yet he took no part and didn't know of Ripperger's discharge because it was not a "serious problem."

Respondent had just cause to terminate him as a route driver, but who was thereafter rehired as a production employee) whose testimony regarding this conversation was given at a time prior to the dismissal of charges alleging his being terminated in violation of Section 8(a)(3)—thus, as Respondent suggests, providing Kessler with motive to surround his testimony of unlawful discharge with independent acts of violation of Section 8(a)(1) directed towards him; and on the other hand, Ed Zarda who, on this record, was an interested witness, unlawfully interrogated another employee (Jerome Menke, *infra*) for the purpose of discovering whether the principal union activist (Mark Ripperger) was continuing to solicit support of the Union and whose own credibility, based both on the record of his evasive testimony and my observation of his demeanor, deserve low marks.

Respondent asserts that Kessler, on cross-examination, contradicted himself and that the Kessler interrogation occurred not on the loading dock but in Ed Zarda's office. I have examined the transcript and found no such contradiction.

On the basis of the above testimony, I credit Kessler and conclude, that on or about October 1, 1976, Ed Zarda unlawfully interrogated employee Kessler in violation of Section 8(a)(1) of the Act as alleged in paragraph 5(b) of the complaint.

(3) Kessler also testified that about a week after that (i.e., about October 7 or 8) he asked Ed Zarda for a pay raise. Ed Zarda said: "Let's go down and talk to Ben, he wants to talk to you about the Union thing anyway." They went to Ben Zarda's office where Ben Zarda commenced to explain the advantages of working at Zarda, including the profit-sharing plan and insurance plan that Respondent was going to put into effect in the future. Kessler said that Ben Zarda said something against employees who were employed only a short time and were trying to get unions into Zarda; and that anyone joining a union would be "walking the streets."

On cross-examination, although counsel for Respondent suggested to Kessler that this meeting with Ben and Ed Zarda occurred in early September, Kessler said that it was in October, and after he signed the union card, although he was unclear when in October it was.

Counsel for Respondent mistakenly asserts that Kessler thereafter contradicted his testimony regarding when this conversation occurred by noting that Kessler testified that it occurred *before* he received Ben Zarda's letter regarding the profit-sharing plan. The letter was received during the first week in September and I have searched the record, especially those pages cited by Respondent, and find no contradiction.

Ed Zarda testified that no conversation occurred in which Dwight Kessler asked him about a pay raise. Ben Zarda denied meeting with Kessler concerning his or anyone else's union activities, denies stating that anyone who supported the Union would be walking the streets; and admitted that at the October 12 meeting of employees called by Respondent in the garage, he said that those employees who supported the Union would be "walking

pickets" and those who choose to work "would work." Ben Zarda's preliminary remarks were that:

I stated that I was aware of the Union activities by [Local] 207 that in conscience, there wasn't any way that I could sign a [Local] 207 contract and feel like I was acting in the best interest of the employees or the company; and that if the matter was pursued—Kansas is a right-to-work it could very well be that those who choose to stay with the Union, or support the Union, could very well be walking pickets, and those who choose to work and they have a right to work would work.

While Ben Zarda's testimony demonstrates an unequivocal opposition to the Union, which is his right, his unconditional refusal ("there wasn't any way") to sign a contract with the Union made in his speech to employees was an attempt to quash employee desire to be represented and is an unlawful interference with their Section 7 rights. Compare: *Sky Wolf Sales d/b/a Pacific Industries of San Jose*, 189 NLRB 933, 941, 944 (1971), *enfd.* 470 F.2d 827 (C.A. 9, 1972), with *Donald Walker and Arthur Nunez, Co-Partners d/b/a Central Buying Service*, 223 NLRB 542 (1976), especially where Ben Zarda joined with this statement his prediction that union supporters, in view of Respondent's opposition to the Union, would have no recourse other than to picket. Here, where Respondent suddenly called the meeting of all employees in anticipation of the union meeting the next day, such prediction of unconditional refusal to sign a union contract¹⁸ and the inevitability of union supporters having to picket, is not describing action Respondent would take for reasons of economic necessity, but of punitive action. This constitutes unlawful coercion. *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

While the October 12 speech of Ben Zarda is not specifically alleged as containing unlawful statements, the factual matter is not in dispute and fully litigated at the hearing. *Newton Joseph d/b/a Meat Packers International*, 225 NLRB 294 (1976), and cases cited. I conclude that Ben Zarda's statements therein were coercive within the meaning of Section 8(a)(1) of the Act.

I further conclude that Dwight Kessler's version of what Ben Zarda told him in his office about union supporters walking the streets was vague. Although I was, in other instances impressed with Kessler's recollection of the events, his recollection of this matter was not persuasive. While I am unwilling to credit Ed Zarda's denial that around October 7 Kessler never spoke to him about a pay raise and that this led them into Ben Zarda's office, I am unwilling to separate Kessler's dim recollection of Ben Zarda saying something about employees "walking the streets" from the testimony that Ben Zarda, even then, was speaking of picketing rather than a threat of terminating employees. I therefore recommend that paragraph 5(a)(2) of the complaint be dismissed. *Donald Walker and Arthur Nunez d/b/a Central Buying Service*, 223 NLRB 542, *fn.* 2 (1976), because of the ambiguity of the reference to employees as pickets.

¹⁸ Local 207, on this record, did not claim, at anytime, to be a majority representative of any unit of Respondent's employees, and there is no evidence of Local 207 having made a demand for recognition or for a contract.

(4) Paragraph 5(c) of the complaint alleges that on or about October 12, 1976, Tom Zarda told an employee that he was tired of his activity on behalf of the Union. I have recommended that this allegation be dismissed on the ground that Tom Zarda could lawfully admonish Ripperger for engaging in union activities on worktime.

(5) Paragraph 5(d) of the complaint alleges that on October 13, Ed Zarda interrogated an employee concerning whether another employee was soliciting for the Union.

Employee Jerome Menke testified, Ed Zarda did not deny, and Respondent admits that on October 14, after the October 13 union meeting, employee Menke spoke with Ripperger in the "cooler" (Ripperger's workplace). Ed Zarda then asked Menke if Ripperger "was still hustling"¹⁹ Menke answered Ed Zarda "yes." Then, Ed Zarda made a phone call from a nearby office, overheard by Menke, and told someone that "Mark was still up to the same old shit."

Even without the aid of a dictionary²⁰ there is little ambiguity as to Zarda's use of the word "hustling"—especially with the subsequent fecal explanations regarding Ripperger's continued, unwaivering union activity. One would be naïf to suppose that the "same old shit" did not refer to Ripperger's continued support of the Union. One is not required to be naïf. *Shattuck Denn Mining Corporation (Iron King Branch) v. N.L.R.B.*, 362 F.2d 466, 470 (C.A. 9, 1966).

Respondent defends on the ground that the telephone call by Ed Zarda was a private conversation, not intended to be communicated and was therefore not a violation and, in any case was an isolated incident.

The telephone call was not the unlawful interrogation of Menke—the question: "Is Mark still hustling?" is the unlawful interrogation.

As to whether it was isolated, the facts of this case demonstrate that Ed Zarda's interrogation of Menke, like his interrogation of Kessler, and Allen Jones' interrogation of Ripperger was part of Respondent's interest in its employees' union activities, in general, and its surveillance of Ripperger's in particular. I conclude that on October 13, 1976, Ed Zarda, as alleged in paragraph 5(d), engaged in coercive interrogation of employee Jerome Menke and, in addition, was engaging in unlawful surveillance of Ripperger's union activities.

(6) Paragraph 5(e) alleges that on October 15, 1976, Supervisor Larry Brown interrogated an employee whether or not the Union would be "moving in" and paragraph 5(f) alleges that on November 1, 1976, Supervisor Allen Jones interrogated an employee concerning the employee's interest in the Union.

On several occasions in October 1976, Larry Brown asked Ripperger about the Union and when it would be "moving in." On one such occasion, at the height of union activity not knowing that Brown was a supervisor, Ripperger discussed the Union with Brown. Brown did not disclose, nor did Ripperger know, that Brown was a supervisor.

¹⁹ When General Counsel inquired as to Menke's understanding of "hustling," Respondent objected and I sustained the objection. In its brief, Respondent archly asserts, that there is no testimony whether Menke thought "hustling" referred to union activity.

²⁰ The Random House College Dictionary, copyright 1973, p. 648: The word "hustle," in its slang meanings, is (a) to earn one's living by illicit or unethical means; and (b) (of a prostitute) to solicit clients. Further, an

As a result of the conversation, Ripperger asked Brown to sign a union card, which Brown declined.

Ripperger started most of the conversations about the Union. He spoke only of his support of the Union.

On one occasion, while Ripperger was speaking to employees in the lunchroom, Supervisor Allen Jones was present. Jones asked him why he was not more "open" in giving out information about the Union. Ripperger asked him if he wanted a union handout. Jones took it. On October 14, Allen Jones admitted that he "jokingly" asked Ripperger if the union was "done" (after the October 13 union meeting). Ripperger answered: "No, we are not done. We are going to get them in." This conversation was not specifically pleaded but was fully litigated.

Insofar as Brown repeated his question, on discrete occasions, as to when the Union was "moving in," I conclude that this was interrogation designed to measure the existing strength of the Union. That this interrogation was directed at a known union sympathizer is not dispositive. I would recommend the dismissal of this interrogation as "isolated" but for its repetition and the background of Respondent's hostility to the Union. *Quemetco, Inc., a subsidiary of RSR Corporation*, 223 NLRB 470 (1976). In this context, I conclude the repeated questioning of whether the Union was "moving in" violates Section 8(a)(1) of the Act as coercive interrogation, as alleged in paragraph 5(e).

On the same ground, however, where Supervisor Allen Jones, on one occasion, in the lunchroom, asked Ripperger why he was not more open in distribution of union materials, Jones was merely requesting—and getting—the latest union handout. On the ground that Jones' remark to the most prominent union supporter was informal shop talk, I find it isolated and not a violation. *Quemetco, Inc., supra* at 481. Where, however, he inquired, like Brown, if the Union was "done," he was inquiring of union intentions and of union strength after the October 13 meeting. Ed Zarda wanted to know the same thing. I therefore recommend that paragraph 5(f) be dismissed insofar as the November 1 incident goes and that the October 14 incident be found to constitute unlawful interrogation.²¹

(6) Paragraph 5(g) alleges that on or about October 28, 1976, Respondent increased employee wages and instituted a new insurance program for the purpose of discouraging employee interest in the Union.

G. The Wage Increase

Respondent ordinarily, but not necessarily, gives wage increases to employees at the conclusion of 30 days and again at the end of 90 days of employment and thereafter on an individual employee basis. Union activity, including solicitation and distribution of union cards, started at the end of September or beginning of October 1976. Respondent's business consultant, Dr. Fred Allvine, in April 1976, recommended that Respondent increase its wages and ben-

"informal" meaning is "to pressure or coerce (a person) to buy to do something." Thus, Ed Zarda was inquiring whether Ripperger was still soliciting on behalf of the Union. At least that is the inference that I draw from the word "hustle."

²¹ General Counsel states in his brief that Jones passed Ripperger's responses along to Ed Zarda. I found no evidence to support that assertion.

efits in order to attract and hold its employees, Respondent's wage rates having ceased to be competitive.

On October 18 and 30, 1976, Respondent sent letters to its employees notifying them of a \$104,975 employer contribution to the employee profit-sharing trust. In 1974, the contribution was \$53,732; in 1975, the contribution was \$84,403. The employer contribution is paid solely out of net profits.

In April 1976, when the recommendation was made to increase wages and benefits, Respondent was financially unable to raise wages at that time. Respondent told at least one of its employees, in September 1976, that it planned to pay its employees—at least its drivers—no less than \$1,200 per month and to give wage increases to its store employees and office clericals. This pay raise was across-the-board, and would vary only enough according to Ben Zarda, to raise employees to the \$1,200-per-month rate, and would have nothing to do with merit increases.²² In September 1976, Ben Zarda told store drivers and clerical employees of a planned increase to \$1,200 per month. No evidence that Tom Zarda told employees under his control that they would get wage increases appears in the record.

On October 12, Respondent called a meeting of all its employees to explain to them the benefits of working for Respondent, after and because it learned that the Union planned to hold a meeting of Respondent's employees on October 13. The Respondent's profit-sharing plan and proposed insurance plan were discussed at the meeting. At the October 13 union meeting, seven of Respondent's employees attended, of which two requested the return of their union membership application cards which they had already executed. On October 14, the day after the union meeting, employee Gary Randolph told Ben Zarda what had occurred at the union meeting.

On the next day, October 15, 1976, Respondent dispatched a letter (G.C. Exh. 3) to its employees reading, in pertinent part:

The confidence you and your fellow employees have recently expressed in the company makes me extremely proud. This confidence will not be betrayed. You have not and will not be denied the fruits of your labor.

* * * * *

We are committed to employing the best employees in the industry. It is our goal to pay every employee a competitive wage in accordance with his ability. We do not want to hold anyone back by an arbitrary standard. As you progress you will receive compensation for your achievements.

* * * * *

In addition to the goals set to raise production and sales, we have similar goals for compensation and all aspects, including salaries, hospitalization insurance, profit sharing, and all other benefits. As an example, we have been working on a new hospitalization plan since

²² Respondent's business consultant, who participated in the decision to grant wage increases, testified the wage increases "in a limited sense" were merit increases constituting rewards for good performances.

²³ Respondent asserts that November 1, 1976, was the target date for

August. We hope to have a program to present to you by the end of this coming week. On June 30, 1976, we made the largest contribution to the profit sharing plan ever. The employees' profit sharing fund is now valued at over \$300,000.00

I do not believe that either you or the company will prosper if Zarda Brothers Dairy, Inc. is unionized. History indicates that almost every dairy whose employees were represented by Teamsters Local 207 went out of business. . . . Many of Local 207 members are without jobs. Foremost Dairy is closing its plant. . . .

I urge you to consider and discuss with your family the Teamsters retirement benefits versus your profit sharing plan. . . .

September sales and production figures just now available indicate a new high in production and sales. Profits are expected to reach a new high. . . .

I conclude that this letter was dispatched because of the Zarda employees' union activities, in general, as Ben Zarda admitted; that it was a congratulatory document designed to underline the obvious failure of the union meeting of October 13 of which employee Gary Randolph informed Ben Zarda on October 14. Ben Zarda admitted only that, because the letter included the word "confidence," it was a "letter of thanks to the employees." Ben Zarda testified that the "thanks" and "confidence" he had in mind was in return for employees' hard work during, as one explanation, the past 2 years, and as another explanation, because of their hard work in September 1976. The record reveals Ben Zarda making evasive answers to direct questions as to the meaning of the word "confidence" and I reject his several explanations.

Respondent received its profit-and-loss statement in the second half of October 1976 for the fiscal year July 1, 1975-June 30, 1976. Profit-and-loss statements for a preceding month became available 25 days after the conclusion of the prior month. Thus, it is uncontradicted that the September sales figures, available in late October, together with the yearly profit-and-loss statement, also available in the second half of October, would permit Respondent to project its sales and profit picture for the ensuing year. As above-noted, wage increases were to be paid out of profits as was the employer's contribution to the profit-sharing plan.

On October 27, 1976, Respondent's business consultant met with Ben Zarda regarding the wage increase. Zarda thought a general wage increase at that time might be construed as an effort to affect the employees' union activities but the business consultant, Dr. Fred Allvine, said:

Damn, Ben, we made plans to do this, this union activity could go on indefinitely, we've got the information, we planned to make the increases and this is the time to do it.

On November 1, 1976,²³ Respondent granted an across-the-board increase to all of its 95 full-time employees, of

implementation of the wage increase. I have searched the transcript of evidence and other documents in evidence. There is no evidence in this record that there was any target date of November 1, 1976, or any other particular date for putting the wage increase into effect.

whom 55 were within the unit subject to the Union's organizational effort. No such increase on the evidence of record, had ever been granted before.

H. Discussion and Conclusion Regarding the Wage Increase of November 1, 1976

The granting of economic benefits by the unilateral action of an employer while union organizational efforts are under way or while a representation election is pending, is presumptively a violation of Section 8(a)(1) of the Act. *N.L.R.B. v. Exchange Parts, Co.*, 375 U.S. 405 (1964); *N.L.R.B. v. Dorn's Transportation Company, Inc.*, 405 F.2d 706, 714 (1969); *Arrow Elastic Corporation*, 230 NLRB 110 (1977). The unlawfulness of the granting or announcing of benefits during the union's organizational effort depends on whether from all the circumstances, the employer's purpose was to cause employees to accept or reject a representative for collective bargaining, *Botnick Motor Corporation*, 205 NLRB 800, 805-806 (1973), and cases cited therein; and upward revisions in employment terms are presumptively unlawful, even if based upon determinations made prior to the advent of union activity, *Arrow Elastic Corp., supra*.

In the recent *Arrow Elastic Corp., supra* at 112, the Board adopted the Administrative Law Judge's framing of the scope within which such employer announcements of benefits are permitted:

Thus, an employer is free to include such references in antiunion propaganda if he can demonstrate either (1) that such announcements were limited to terms already integrated into the existing benefit structure [*Schwab Foods, Inc.*, 223 NLRB 394, fn. 1] or (2) at a minimum, that the original determination to grant the prospective benefit was followed up and implemented by a sequential chain of events during the period before any union activity so as reasonably to dispel notions that the ultimate implementation was accelerated because of the union activity [*Mr. Fine, Inc.*, 212 NLRB 399, 402]

As applicable to the facts above stated, it is clear that the general wage increase of November 1, 1976, was not a wage increase integrated into the existing benefit structure of Respondent's pay system since no such increase had ever been made. If Respondent is to overcome the presumption of invalidity under the above *Arrow Elastic Corp.* statement, it must show such a "sequential chain of events" so as to demonstrate that the actual determination to grant the raise occurred before any union activity to dispel any notion that ultimate implementation was accelerated by union activity. However, even where benefits are decided upon prior to the filing of a petition—or initiation of union activity—if the timing of the announcement of benefits is calculated and designed to influence the employees in the selection of a bargaining representative, it is unlawful under *N.L.R.B. v. Exchange Parts, supra*, and *Hineline's Meat Plant, Inc.*, 193 NLRB 867 (1971).

1. There is no proof that November 1, or any other date, was an agreed-upon date to make the general pay raise, which agreement occurred before the occurrence of

any union activity. Respondent asserts in its brief that the "target date for implementation of the wage increase was November 1?" It cites pages 749 and 752 of the transcript of testimony in support thereof. I have read those pages and the transcript in general and there is no such "target date." The most that can be said is that Dr. Allvine, Respondent's financial consultant, testified, in response to Respondent counsel's question of significance of November 1, 1976, that the pay increase could not be paid in April 1976 because of "severe economic pressures" in 1974 and 1975 and that that "period of time" is significant because (a) Respondent's *audited* financial statement (for its fiscal year July 1975–February 30, 1976) was not available until the second half of October 1976, "so we were able to see where the Company was, how it had done."; and (b) in October, Respondent had its sales volume for the significant month of September 1976, from which it prognosticated an ability to pay the increased wages in 1976–77 because its wholesale sales increased by 20 percent with corresponding upward profits.

2. Respondent knew enough of its upward profit picture by its letters to employees of August 18 and 30, when it made its announcement of the June 30, 1976, contribution to the profit-sharing trust fund, before any union activity, without an *audited* profit-and-loss statement—to announce the "greatest contribution yet to the Employees Profit Sharing Trust Fund" (Resp. Exh. 1). There is no mention of any intended wage increase. According to Respondent's witness Charles Sims, the first time that a wage increase—as opposed to the better insurance plan—was discussed with Ben Zarda and the wholesale route drivers, was *after* union activity started. In March or April 1976, Ben Zarda had called Sims into Zarda's office and discussed the matters of the new insurance plan and a profit-sharing trust. No mention was made of any increase in wages much less when it would take effect.

Even were I to credit employee Pankey's recollection that, in the second week of September 1976 (i.e., before union activity commenced), Ben Zarda called Pankey into his office, discussed the recent profit-sharing contribution and told him that he wanted to make a wage increase "in the near future" so that every driver would make \$1,200 per month (I do not credit Pankey because Sims failed to corroborate the wage increase and \$1,200 per month testimony even though he would necessarily have been called into Ben Zarda's office *after* Pankey since union activity did not begin until October), there was no such finalization of the decision to make the wage increase, nor the amount, let alone the date, as to conclude that the sequence of giving a wage increase was not affected and advanced by union organization.

Lastly, in its letter to employees on October 15, 1976 (G.C. Exh. 3), Respondent referred not only to a past benefit (its June 30, 1976, profit-sharing contribution), but to a benefit-in-progress, a "goal" to compensate its employees: "We have been working on a new hospitalization plan since August." Since future benefits were mentioned, one would expect mention of a pay raise in the works since the prior April and to be paid only 2 weeks after the letter. No such mention is made.

3. In any event, even if the sequence of granting the general wage increase was irrevocably set in motion in April 1976, as Respondent asserts, I would conclude that the purpose in granting the raise at that time was to express Respondent's appreciation for the employees' rejection of the Union. For even were the evidence to establish that Respondent decided upon a wage increase for valid economic reasons prior to knowing of any union activity, that does not dispose of the issue. Just as the grant of a benefit constitutes a violation of Section 8(a)(1) because of the time it is given, regardless of when it was planned, *Revco Drug Centers of the West, Inc.*, 188 NLRB 73 (1971), so will the grant of benefits be unlawful if other evidence shows a motive to interfere with the organizational campaign. *Emery Air Freight Corporation*, 207 NLRB 572, 576 (1973).

Here, the evidence shows that Respondent called its October 12 meeting of employees immediately after it learned of the Union's planned meeting of the next day, and where Respondent discussed benefits to its employees. The attendance at the union meeting the next day was limited to seven employees²⁴ of whom two asked for the return of signed cards. On October 14, Respondent's president was personally informed of what happened at the union meeting and on October 15, Respondent dispatched its letter (G.C. Exh. 3) to its employees telling of new and planned benefits, advising them of the Company's belief that union organization would cause Zarda Brothers to fail to prosper and telling them of Respondent's pride in the employees because of the "confidence you and your fellow employees have recently expressed."

In concluding that Respondent was unlawfully thanking them for rejecting the Union,²⁵ I believe the evidence, as adduced in Respondent's letter of October 15, 1976, and from surrounding circumstances demonstrates that Respondent was telling its employees on October 15 of past and future benefits they could expect because of the "confidence" in Respondent they had shown in rejecting the Union 2 days before. The wage increase of November 1, not even mentioned in the October 15 letter, inevitably impressed employees with the idea that a union defeat means, in the words of the October 15 letter, a company that will prosper and pay employees the "fruits of their labor": to raise compensation "in all aspects." Such an impression is magnified where, as here, the type of wage increase is unprecedented, *Luxuray of New York, supra*, 447 F.2d 112, 118-119 (C.A. 2, 1971).

Respondent argues that the words "confidence you and your fellow employees have recently expressed in the Company" was Ben Zarda's reference "generally to the 2 prior

years which had been difficult ones and particularly to the preceding September" when Respondent's employees worked 12 hours per day to give Respondent a 20-percent increase in sales.

Aside from the fact that, as Respondent stated in its brief, its profit and loss and underlying sales figures for September would not be available until the latter part of October (i.e., October 25), and October 15 is not "the latter part of October" (and thus the employer's "confidence" could not relate to employees' September performance) I find the suggestion in the record of Respondent expressing thanks for 2 difficult years incompatible with confidence "recently expressed," as the October 15 letter states. I conclude that Ben Zarda's explanation for employees "confidence . . . recently expressed" are not credible as explanations of Respondent's conduct in granting the wage increase.²⁶

I conclude, therefore, that (1) the November 1 across-the-board wage increase, the first of its kind, whether or not a "merit increase" was not inevitably set in motion in April 1976 so that it had to be announced and granted on November 1976; and Respondent has not overcome the presumption that the wage increase was granted to interfere with its employees union activities, *Tekform Products Company, a Division of Bliss & Laughlin Industries*, 229 NLRB 733 (1977); *Herbert Kallen d/b/a Smithtown Nursing Home*, 228 NLRB 23 (1977); and (2) the November 1 wage increase, in any event, was granted to thank the employees for not supporting the Union and to impress upon them the idea that their rejection of the Union meant better terms and conditions of employment, and is therefore unlawful, *Luxuray of New York, supra*. Under no circumstances was the unique November 1 across-the-board wage increase "a normal and regular wage increase" as suggested by Respondent's citation and quotation from *N.L.R.B. v. Eugene Yokell and Bernard Yokell, Co-Partners, d/b/a Crescent Art Linen Co., et al.*, 387 F.2d 751, 756 (C.A. 2, 1967).²⁷ In *Yokell*, the wage increases were found unlawful because, as here, the purpose was to undermine union support among employees.

1. The New Hospital Insurance Plan

Contrary to the allegations of paragraph 5(g), Respondent effectively rebutted the presumption that the institution of the new health insurance plan was unlawful.

The existing plan expired November 9, 1976. Respondent sought renewal in early 1976. The evidence regarding the new health insurance plan shows that but for the withdrawal of Employers' Insurance of Wassau from writing

²⁴ There is no evidence, of course, of how many employees would have attended the union meeting of October 13 but for Respondent's meeting of October 12; nor is there even evidence of how many employees signed union cards. Since the issue here presented, however is Respondent's motive in granting the wage increases, it is sufficient to note that Respondent congratulated its employees for refraining from attending the union meeting. See *supra*. Thus, the inference is drawn that Respondent was pleased (employee "confidence") with the attendance it learned about on October 14.

²⁵ Ripperger testified that there was union activity among the unit employees even after the October 13 union meeting. There was no reason to believe that either he had ceased proselytizing or even that the failure of the union meeting to attract employees was the equivalent of a union election defeat. See *Luxuray of New York, Division of Beaunit Corporation v. N.L.R.B.*, 447 F.2d 112, (C.A. 2, 1971); *N.L.R.B. v. George H. Genithes, et al. [Hagan Oldsmobile-Cadillac]*, 463 F.2d 557 (C.A. 3, 1972).

²⁶ Ben Zarda, at one point, admitted that the "confidence" he referred to in the October 15 letter was that only seven employees had attended the union meeting and two backed out. He then denied that that was what "confidence" in the company meant. This reversal and subsequent evasive testimony regarding its meaning leads me to discredit Ben Zarda. In addition, his preliminary inability to recall that it was Gary Randolph who told him what occurred at the October 13 union meeting likewise was not an impressive credibility support.

²⁷ *N.L.R.B. v. Yokell d/b/a Crescent Art Linen Co., supra* at 756: "and we emphasize that the granting of normal and regular increases in employee benefits are not held to be an unfair labor practice merely because a union drive was in progress. . . ."

health insurance, the new coverage would have become effective as early as July 1, 1976. Unlike the wage increase, as a result of Respondent's insurance broker's actions, Ben Zarda discussed new health insurance policy as early as March and April 1976 with employees. Unlike the wage increase, full agreement on the terms and coverage occurred in early September 1976 and, although there was no general announcement at that time, Respondent spoke of the new policy with employees before union organizational activity commenced.

The dispositive factor is that the old policy expired on November 9 and the new policy took effect on November 9. Apart from all other considerations, the prior existence and necessity for continuity of Respondent's health insurance program brings such a benefit within the terms of employment already integrated in the existing benefit structure, *Arrow Elastic Corp.*, *supra*. The November 9 date had to be met or the coverage would have lapsed.

I conclude, therefore, that unlike the grant of the November 1 wage increase, the grant of the new health insurance program was not a violation of Section 8(a)(1) of the Act and I shall therefore recommend that to the extent paragraph 5(g) alleges otherwise, it should be dismissed.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, and therein found to constitute unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, occurring in connection with the Respondent's business operation as set forth in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in the unfair labor practices set forth above, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act as follows:

Having found that Respondent discharged Mark Ripperger on December 3, 1976, and did not thereafter offer him reinstatement I recommend that Respondent offer him immediate and full reinstatement to his former position or, if such position has been abolished or there has been a change in Respondent's operations, to a substantially similar position without prejudice to his seniority or other rights and privileges; and that Respondent make him whole for any loss of earnings and other benefits he may have suffered by reason of Respondent's unlawful discrimination against him by payment to him of a sum equal to those earnings and benefits which he would normally have

received commencing December 3, 1976, the date of his termination, until Respondent offers him full reinstatement, less any interim earnings *Guadalupe Carrot Packers d/b/a Romar Carrot Company*, 228 NLRB 369 (1977). Backpay is to be computed, on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest at the rate of 6 percent per annum to be computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1963). I further recommend that Respondent make available to the Board, upon request, payroll and other records in order to facilitate checking the amounts of earnings due him and any other rights he might be entitled to receive.

Notwithstanding my finding and conclusion that Respondent granted its November 1, 1976, wage increase to its employees for the purpose of unlawfully interfering with the organizational campaign of the Union among such employees, nothing herein shall be construed as forcing or requiring Respondent to vary, abandon, or withdraw any wage increase or other economic benefit granted by it or other terms or conditions of employment heretofore established. *The Press Company, Incorporated*, 121 NLRB 976, 981 (1958); *Gordon Manufacturing Company*, 158 NLRB 1303, 1304 (1966).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(3) and (1) of the Act by its discriminatory discharge of Mark Ripperger on December 3, 1976, because he engaged in union and concerted activities with other employees for the purpose of mutual aid and protection, thereby discouraging such activities.

4. Respondent violated Section 8(a)(1) of the Act on or about November 1, 1976, by announcing and granting a wage increase to its employees for the purpose of interfering with the organizational campaign of the Union among such employees, thereby interfering with, restraining, and coercing employees in the exercise of rights guaranteed in the Act.

5. Respondent violated Section 8(a)(1) of the Act, commencing about October 1976, by coercively interrogating employees, by maintaining surveillance over their union activities, and by making declarations to employees that their joining or supporting the Union would be futile since it would not sign a contract with the Union.

6. The foregoing unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]